Supreme Court, U.S.
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No. _____

IN THE

Supreme Court of the United States

Kenneth Curtis,
Individually and d/b/a
Privacy Protection Services,
Petitioners,

v.

The State of South Carolina,
The South Carolina General Assembly
Ex rel., Charles M. Condon, as Attorney
General for the State of South Carolina

On Petition For Writ of Certiorari
To The South Carolina Supreme Court

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether South Carolina Code Ann. § 16-14-370 violates Article I, Section 8 of the United States Constitution by prohibiting the transportation of urine into South Carolina.

2. Whether South Carolina Code Ann. § 16-14-370 violates the Petitioner's First Amendment Rights of Freedom of Expression. If so, has the State shown a compelling state interest and demonstrated that the statute is the least restrictive means of ensuring its stated interest, in accordance with the Fourteenth Amendment?

3. If South Carolina Ann. § 16-14-370 does not violate the Petitioner's First Amendment Rights of Freedom of Expression, whether the State has demonstrated a legitimate state interest in enacting S.C. Code Ann. § 16-14-370 in accordance with Petitioner's Constitutional right to Substantive Due Process under the Fourteenth Amendment.

4. Whether South Carolina Code Ann. § 16-14-370 violates the Petitioner's Constitutional Right of Procedural Due Process under the Fourteenth Amendment because it is vague, overbroad and has the potential of selective enforcement.

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Kenneth E. Curtis, individually and d/b/a Privacy Protection Services
Petitioner,
v.
The State of South Carolina, The South Carolina General Assembly Ex rel. Charles M. Condon, as Attorney General for the State of South Carolina
Respondent.

Petition for a Writ of Certiorari to the South Carolina Supreme Court

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PETITION FOR A WRIT OF CERTIORARI

Kenneth E. Curtis respectfully petitions for a writ of certiorari to review the judgment of the South Carolina Supreme Court in this case.

OPINIONS BELOW

The opinion of the State Supreme Court is reported at 345 S.C. 557, 549 S.E. 2d 591 (2001). App. *infra.* at 1a.

JURISDICTION

The South Carolina Supreme Court entered its judgment on July 17, 2001. Petitioner timely sought rehearing by the South Carolina Supreme Court, and that request was denied on August 10, 2001. App. *infra.* at 24a. This Court's jurisdiction is invoked pursuant to the United

States Constitution article VI, section 2. U.S. CONST. art VI, § 2.

CONTROLLING CONSTITUTIONAL PROVISIONS

U.S. CONST. art 1, § 8

"The Congress shall have power to . . . regulate commerce with foreign nations, and among the several states and with the Indian Tribes"

U.S. CONST. amend. I

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to perform the government for redress of grievances."

U.S. CONST. amend XIV, § 1

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF CASE

A. Overview

The Petitioner appeals the South Carolina Supreme Court's decision upholding the constitutionality of South Carolina Code Ann. 16-13-470 App. *infra* at 33a. passed into law on June 11, 1999 (1999 Act No. 65). This statute among other things makes it a felony to sell urine with the intent to defraud a drug or alcohol screening test and originally created a presumption of intent to defraud when a heating element, or other such device, or instructions that provide a method to thwart a drug-screening test accompanies the sale, distribution or marketing of urine.

In 1996, the Petitioner started a business over the internet known as "Privacy Protection Services." The Petitioner considered the business primarily as a method of expressing his views about the invasion of privacy that the national trend of urinalysis for numerous purposes by employers has become. The Petitioner began to sell his own urine to interested individuals for whatever use they wished. The urine is certified as drug and adulterant free. Petitioner accompanied the sale of his urine with a pouch, tube chemical hand warmer type device and directions and statements concerning the flaws of urinalysis. The Petitioner does not tout the product as a means to avoid detection of drug or alcohol abuse. Based upon an article that was published in a Greenville business magazine concerning Petitioner's business, a Bill was introduced by Greenville Senator David Thomas to prohibit Petitioner's business and this Act was passed into law on June 11, 1999.

B. The Prior Lawsuit

Petitioner filed a Complaint and Motion for an Ex Parte Temporary Restraining Order and Motion for Temporary Injunction. App. *infra* at 39a. The Honorable Charles B. Simmons, a Circuit Court Judge, issued an Order granting the Ex Parte Temporary Restraining Order on March 18, 1999. The Motion for a Temporary Injunction was then heard before, the Honorable Thomas J. Ervin, on June 25, 1999. The trial court denied the Motion for a Temporary Injunction at the hearing. A formal Order was filed on July 3, 1999. A Motion to Reconsider was filed, and on July 14, 1999 an Order signed by Judge Ervin, denied the Motion.

The Honorable Henry F. Floyd conducted a hearing and ordered bifurcation of the proceedings between the Temporary Injunction and the merits of the case. The Honorable Alison Renee Lee heard the Motion regarding the merits, and found the Petitoner's causes of action unsubstantiated by Order filed August 18, 2000. A Motion to Reconsider was filed and Judge Lee denied the Motion to Reconsider on September 29, 2000.

Separate appeals were filed to the South Carolina Supreme Court regarding Judge Ervin's Order denying the request for a Temporary Injunction and Judge Lee's Order ruling on the merits. The South Carolina Supreme Court heard oral arguments on October 4, 2000. The Supreme Court reviewed both the Temporary Injunction and merits issues at that time. On July 17, 2001 the Court affirmed Judge Ervin's Order and issued their ruling striking the presumptive intent clause of the statute, but holding that the way the urine was packaged, can be used as circumstantial evidence. The remainder of section 16-13-470 was held to be valid. Consequently, the South Carolina Supreme Court's Order should have said "Affirmed in part and Reversed in part", due to its striking down part of the statute.

A Petition for Rehearing was filed regarding the July 17, 2001 Order, and the Supreme Court denied the Petition for a Rehearing on August 10, 2001 ending the state appeals for the Temporary Injunction matter.

On October 12, 2001, the Supreme Court issued an Order regarding the merits appeal, although they discussed the merits in the July 17, 2001 Order. App. *infra.* at 18a. The October 12, 2001 Order, affirmed as modified the July 17, 2001 Order. Therefore, another Petition for Rehearing was filed on October 26, 2001, regarding the merits. The time of the filing of this petition, Petitioner has yet to hear from the South Carolina Supreme Court as to the status of the Petition for Rehearing regarding the merits. App. *infra.* at 27a. Petitioner will amend this petition with the status of the second rehearing request when it is received. However, for Petitioner to preserve his appeal to the United States Supreme Court and meet the ninety-day filing requirement, Petitioner files this petition in response to the August 10, 2001 South Carolina Supreme Court Order denying rehearing.

Petitioner first raised the issue that his constitutional rights were violated by the enactment of S.C. Code Ann. § 16-13-470, in his initial Complaint filed June 18, 1999 and in

his Amended Complaint filed October 4, 1999. App. *infra* at 39a & 47a. Petitioner alleged that his First, Fourth, Fifth, Sixth, Eighth and Fourteenth Amendment rights were violated along with his rights under Article I, § 8 of the United States Constitution.

REASONS FOR GRANTING THE PETITION

The Supreme Court should grant review of this petition for a writ of certiorari for the following compelling reasons. First, the South Carolina Supreme Court decided important issues that conflict with several United States Supreme Court decisions regarding the Commerce Clause, First Amendment and Fourteenth Amendment. The narrow issue to be determined by this Court, which has not been previously addressed, is the validity of a state's statute that completely prohibits the sale or transport of urine into a state's borders, and whether the state can prohibit such conduct and violate people's First Amendment rights in the name of promoting a safe work environment. The decision by the South Carolina Supreme Court expands the scope of a state's right to interfere in the relationship between a private employee and a third party with the alleged interest of promoting work place safety. The State Court's decision conflicts with relevant constitutional issues.

Petitioner has standing to assert the unconstitutionality of the Act. Petitioner has been arrested twice for "violating" section 16-13-470, and is currently facing felony charges that carry a sentence of either ten thousand dollars or five years in prison or both. The Act, as drafted, constitutionally proscribes Petitioner's own conduct, which permits him to sell his urine in conformity with his beliefs, regardless of the intent of his customers.

I. THE DECISION BELOW CONFLICTS WITH THIS COURT'S PREVIOUS DECISIONS. THE STATE COURT'S DECISION HAS THE POTENTIAL TO GREATLY EXPAND THE SCOPE OF A STATE'S RIGHT TO INTRUDE INTO THE AFFAIRS OF PRIVATE CITIZENS.

In order to present a backdrop to Petitioner's claim, a succinct discussion of the history of urine testing in our courts, along with the problems and concerns that arise when urine tests are performed, is essential. The State of South Carolina down plays the link between the validity of urine testing and the issues involved in Petitioner's claim for justice. Yet, it is the State of South Carolina that brings the urine testing issue into the forefront of Petitioner's claim, since they are the ones who assert the insurmountable need for urine testing for the endorsement of a "safe work environment".

A. Constitutionality of urine testing

In 1989, this Court examined the constitutionality of urine test administered by the federal government in two cases. In Skinner v. Ry. Labor Executives Ass'n., 489 U.S. 602, 109 S.Ct. 1402, 103 L.Ed. 2d (1989), railroad employees were required to undergo a urine test at the demand of the their employer under limited conditions. Testing was required either when there was an accident at work, or a violation of certain safety rules. The proponents of preserving this regulation on railroad workers argued that railroad employees posed a serious threat of safety to innocent citizens, the environment and the economy. Their arguments were based on studies correlating damages and accidents with intoxicated railroad workers.[1] However, the challengers of the regulation asserted that the regulation invaded the Fourth Amendment rights of the employees.

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[1] In eight years there were forty-five accidents relating to alcohol and drug abuse. There were thirty-four persons who were killed and sixty-six injured, with 28 million dollars in damages. Id. dissent.

The Fourth Amendment guarantees the privacy, dignity and security of persons against certain arbitrary and unusual acts by officers of government or those acting at their direction. Camara v. Mun. Court of San Francisco, 387 U.S. 523, 528, 87 S.Ct. 1737, 18 L.Ed. 2d 943 (1967). When asserting the invasion of their right to privacy, the challengers argued that urine samples require employees to perform an excretory function, which is among the most private act an individual can perform.

This Court held that although the railroad employees' Fourth Amendment rights were implicated, it had been shown that railroad employees pose a serious threat to safety; therefore, the limited conditions in which the employees were to perform urine tests were deemed appropriate. "The necessity to perform that regulatory function with respect to railroad employees engaged in safety sensitive tasks, and the reasonableness of the system for doing so, have been established in this case." Skinner, 489 U.S. at 633.

Conversely, Justice Marshall joined by Justice Brennan in the dissent, stated that "few activities in our society [are] more personal or private than the passing of urine. Most people describe it by euphemisms if they talk about it all." Skinner, *supra citing* National Treasury Employees Union v. Von Raab, 816 F.2d 170, 175 (Ca. 5 1987). Justice Marshall went on to pronounce that urine test can not measure current impairment and therefore cannot differentiate between "on duty impairment" and prior drug and alcohol use which has ceased to effect the user's behavior. Id. *citing* 49 CFR § 219.309(2) (1987). "The goal is to ascertain current impairment and not identify persons who have used substances in their spare time and pose no risk to on duty impairment." Skinner, 489 U.S. at 652.

The same day the Supreme Court decided National Treasury Employees Union v. Von Raab, 489 U.S. 656, 109 S.Ct. 1384 (1989). In Von Raab, employees at the National Treasury who applied for promotions that would include direct involvement in the interdiction of illegal drugs into

the United States were subject to urine testing. Proponents of the urine testing proclaimed that the policy rationale was if these individuals were granted the promotion, they would be carrying firearms, and that carrying a deadly weapon with impaired judgment or perception would be harmful. In addition, there was concern about the possibility of these individuals being more susceptible to accepting bribes when specializing in the deterrence of illegal drugs into the United States. The proponents further went on to proclaim that the public should not bear the risk that these employees might suffer from an impaired perception. Although the opposition was willing to concede that drug abuse is one of the most serious problems that plague our country today, they opposed the regulation because it was not in response to any perceived drug problem. Furthermore, the urine testing had not led to discovery of any significant number of drug users within the ranks of those applicants being tested. Von Rabb, 489 U.S. at 683.

The Court held that the government's compelling interest in safeguarding the borders of our country and the public safety is greater than an employee's individual privacy interest. The Court also remanded the issue of whether those who handle classified information shall be subject to urine testing. The dissent authored by Justice Scalia and joined by Justice Stevens, acknowledged the majority's concerns and went on to state a powerfully eloquent opposing opinion. The dissent first recognized that the government could not justify the purpose, need, or reason for the regulation, ". . . notably absent, revealingly absent and as far as I am concerned dispositively absent is the recitation of *even a single instance* in which any of the speculated horrible actually occurred . . ." Von Raab, 489 U.S. at 683.

More recently the Supreme Court has ruled on the constitutionality of urine testing outside of the work-related context. In Veronia Sch. Dist. v. Acton, 515 U.S. 646, 115 S.Ct. 2386, 132 L.Ed. 564 (1995), the Court held that random drug screening on student athletes was valid. The Court found there was an important interest in preventing health

issues that arise among athletes who use drugs, and that the regulation would serve as a deterrent against drug use among students.

However, in Ferguson v. City of Charleston, 532 U.S. 646, 115 S.Ct. 2386, 132 L.Ed. 2d 205 (2001), the Supreme Court struck down a South Carolina regulation that would permit pregnant mothers who tested positive for drugs, to be arrested. The Court reasoned that the regulation did not meet the "special needs" required to mandate a Fourth Amendment nonconsensual search. Under section 16-13-470, South Carolina has now made that same pregnant mother subject to incarceration if they perceive that she attempts to "foil" a drug test by consuming excessive amounts of water, the primary adulterant of drug tests, even though they cannot arrest her for testing positive.

Petitioner believes that Ferguson *supra* is a perfect example of why he promotes his product and that his business is not driven by profit. Petitioner feels that like the women in Ferguson, people should have the right to protect themselves from the overreach of law enforcement. He is aware that many people have their constitutional rights violated with no recourse to prevent that from occurring. Therefore, his business is used to educate people and to encourage people to begin to question the validity of actions by government, employers and hospitals that require them to perform, without valid probable cause.

The precedent that South Carolina wants to establish is a novel step into the private relationship between employer and employee. The Supreme Court acknowledges that the Fourth Amendment does not apply to private industries but rather only to government employees. "Although the Fourth Amendment does not apply to search or seizure, even an arbitrary one, effected by a private party on his own initiative, the Amendment protects against such intrusions if the private party acted as an instrument or agent of the government." Skinner, 489 U.S. at 613. Previous cases have addressed only the direct relationship between the employer and the employee and the employer's

ability to test for drugs in certain prescribed situations. S.C. Code Ann. § 16-13-470 deviates from this narrowly tailored approach by including a third person, the Petitioner. This Act holds a third party responsible for the behavior of an employee at work.

The South Carolina Supreme Court in their Opinion misguidedly states, "A statute making it unlawful to defraud a drug test furthers the public purpose of ensuring a drug free workplace." Curtis v. South Carolina, 345 S.C. 557, 570, 549 S.E.2d 591, 599 (2001). However, no evidence has ever been presented that urine testing prevents anything. The ramifications exceed not only the private workplace and the doctor-patient relationship, but also every aspect of society. The State has never rebutted Petitioner's assertions and evidence that urine testing at work is not effective in securing a safe work environment.

B. Use and the Validity of Urine Testing

The use of urine testing is on the rise. In 1987, 21.5% of employers used urine testing compared to a dramatic increase in 1994 to 87.29%.[2] Urine testing has been found to be unreliable. The false positive rate is at least ten (10%) percent and could be as high as thirty (30%) percent.[3] Vicks Formula 44-M and codeine have been identified in urine tests as heroin, Nyquil as amphetamines and Advil as marijuana.[4] Accuracy of drug testing is imperative because there are better ways to test workplace safety.[5] It is evident that by the time an employee's test has been taken, interpreted as positive and returned to the company, any effects of the drug-impaired behavior has worn off. In

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[2] Comer, Debra R. "An Evaluation of Fitness-For-Duty Testing." 103rd Annual Convention of the American Psychological Association. New York. 15 Aug. 1995

[3] See American Civil Liberties Union Briefing Paper Number 5 <http://www.geocities.com/CapitolHill/6443/aclu.html

[4] Id.

[5] Medical World News, Medical Tribune Inc., Volume 29, No. 8. The Case Against Urine Testing. "Urinalysis rests largely on the assumption that fear of detection discourages drug use through intimidation."

addition, there are numerous household items that create false negatives for drug tests such as water, bleach, drain cleaner, soap and vinegar.

The better alternative to urine testing for promoting a "safe work environment" is performance-based testing. Performance testing, for example, assesses hand-eye coordination.[6] An employer may also select to invest in a machine that scans the eyes. The eye scan can be completed in thirty seconds and will detect fatigue, drugs and alcohol use.[7] The benefits in using these alternatives are that 1) it takes less time to collect the data (typically less than a minute; 2) the cost is between $100 - $200 per employee per year (compared to $40 - $60 per test); 3) the results are immediate; 4) it affords better assessment of job performance; and 5) these tests can detect drug use that eludes urine testing (if an individual used cocaine moments before testing the metabolites may not be in the urine).[8]

If this Act is driven by the apprehension of drug abuse in South Carolina's work force, it would be better to create a proactive solution than a reactive solution to this "crisis." Employers should put their efforts into creating policies and procedures that permit competent supervision of their workforce, professional counseling, and a voluntary rehabilitation program.[9] A proactive program is a better investment in an employer's time and resources than testing for a substance that no longer effects the individual's work performance. As currently enacted, the Act fails to meet the stated governmental interest of promoting workplace safety.

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[6] "Daily Skill Test System checks hand-eye coordination in under one minute." (visited Oct. 25, 2001)<http://www.geocities.com/CapitolHill/6443/performa.html

[7] "Fit 2000 Eye Scan Performance Testing." (visited Oct. 25, 2001) <http://www.geocities.com/CapitolHill/6443/fit2000.html

[8] Comer, Debra R., *Supra.*

[9] See ACLU Briefing Paper Number 5.

II. THIS COURT SHOULD GRANT CERTIORARI BECAUSE SECTION 16-13-470 IS AN IMPERMISSIBLE PROHIBITION AND RESTRICTION ON ARTICLE I SECTION 8 OF THE CONSTITUTION.

A. Overview of Commerce Clause.

The Act is an impermissible prohibition and restriction on U.S. CONST. art 1 § 8, commonly referred to as the Commerce Clause. The "prevailing motive [behind the Commerce Clause] was to regulate commerce; to rescue it from the embarrassing and destructive consequences resulting from legislation of so many different states and to place it under protection of a uniform law." Gibbons v. Ogden, 26 U.S. 1, 6 L.Ed. 23, 9 Wheat. 1 (1824). The theme that the Framers desired to create is one of a national area of free trade. Unreasonable burdens on interstate commerce violate the Commerce Clause in and of itself. Dennis v. Higgins, 498 U.S. 439, 111 S.Ct. 865, 112 L.Ed. 2d 969 (1991); American Trucking Ass'n v. Scheiner, 483 U.S. 266, 107 S.Ct. 2829, 97 L.Ed. 2d 226 (1987). The Supreme Court held that "the fact that Congress has not seen fit to prescribe any specific rules to govern inter-state commerce, does not affect the question. **Its inaction on this subject . . . is equivalent to a declaration that inter-state commerce shall be free and untrammeled.**" Welton v. Missouri, 91 U.S. 275, 23 L.Ed. 347, 1 Otto 275 (1875) (emphasis added). Furthermore, it has been an imbedded constitutional doctrine that "where Congress has not acted, **this Court**, and not the state legislature is **under the Commerce Clause the final arbiter of competing demands** of the state and national interests." Southern Pac. Co. v. Arizona, 325 U.S. 761, 768, 65 S.Ct. 1515, 89 L.Ed. 1915 (1945).[10]

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[10] *See also* Cooley v. Bd. of Wardens, 53 U.S. 299, 13 L.Ed. 996, 12 How. 299 (1851); Kansas City So. Ry. Co. v. Kaw Valley Drainage Dist., 233 U.S. 75, 34 S.Ct. 178, 62 L.Ed. 419 (1919); Southern Covington & Cincinnati St. Ry. Co. v. Covington, 235 U.S. 537, 546, 35 S.Ct. 158, 59 L.Ed. 350 (1915); Missouri,

B. S. C. Code Ann. § 16-13-470 is a direct prohibition on interstate commerce.

There are two ways in which a state can violate the Commerce Clause. First, a state may not prevent shipment of goods into another state. Second, a state cannot create regulations that unreasonably impact commerce. *See* Bowman v. Chicago & Northwestern R.R. Co., 125 U.S. 465, 8 S.Ct. 689, 31 L.Ed. 700 (1888). A state cannot put a barrier around its border to bar trade from other states and thus bring to naught the great constitutional purpose of the Founding Fathers in giving Congress the power to regulate commerce. Nippert v. Richmond, 327 U.S. 416, 66 S.Ct. 586, 590, 90 L.Ed. 760 (1946). The United States Supreme Court held that so long as Congress remained silent on the matter, **a state lacks the power of statewide prohibition of traffic on intoxicants**. *See* Bowman, 125 U.S. 465; Leisy v. Hardin, 135 U.S. 100, 10 S.Ct. 681, 34 L.Ed. 128 (1890). Furthermore, a state cannot exclude an article of commerce "simply by declaring that its policy requires such exclusion." Bowman, *supra*.

South Carolina Code Ann. §16-13-470 states "It is unlawful for any person to . . . transport urine into this state with the intent of using the urine to defraud a drug or alcohol screening test." S.C. Code Ann. §16-13-470(A)(1) (Supp. 2000). This provision clearly regulates commerce as it relates to other states. The statute completely **prohibits** urine being transported into this state for the perceived intent to defraud drug or alcohol testing.

C. If the Act is not a direct prohibition on interstate commerce it is an unreasonable restriction on interstate commerce.

This Court should not accept the flimsy argument adopted by the South Carolina Supreme Court that urine can be sold, but not for the limited purpose of defrauding

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Kansas & Texas Ry. Co. v. Texas, 245 U.S. 484, 488, 38 S.Ct. 178, 62 L.Ed. 419 (1919).

alcohol and drug tests. If this Court were to follow suit, than the following factors should be considered: 1) the nature and extent of the burden that state law has on interstate commerce; 2) the reason the state adopted the law; and 3) the weight of the other states and national interest. The Court should consider whether the third factor is greater than the first two factors to mandate a finding that the law is inapplicable. Southern Pac. Co., 325 U.S. 761.

There are several scenarios in which the Act impermissibly burdens interstate commerce. Every human being or animal is able and capable of producing urine. Therefore, since the statute does not distinguish between human and animal urine, nor does it stipulate how the urine must be packaged, every animal and human crossing over the borders of South Carolina, whether traveling through or making it their place of destination, is subject to the parameters of this law. If a South Carolina resident purchased urine over the internet and it was mailed to his or her home and the resident worked in Georgia and used the urine in Georgia, how does that impact South Carolina's concern of promoting a "safe work environment"? In a similar scenario, if a Florida resident purchased urine and the product was shipped from North Carolina to Florida via ground transportation, that truck could be violating the statute as a carrier, for transporting urine into the State of South Carolina with the intent to defraud an alcohol or drug test, which again is not being performed in South Carolina. Otherwise, the carrier would have to reroute travel through the state of Georgia to avoid any possible violation of this statute, thereby incurring much delay and expense. Finally, if someone from South Carolina purchased the urine, and decided not to use it, Petitioner may be responsible although the product was never used.

As stated above, South Carolina adopted the Act under the premise of promoting "safety in the workplace." There has been no evidence tendered by the government to support this blanket representation. There has been no showing that an increased danger in the work place results from employees being intoxicated or under the influence of

illegal substances. There has been no showing of a concern among the workforce, employers, insurance carriers or law enforcement that workplace safety is of widespread imminent concern. Therefore, Petitioner asserts that South Carolina's purported reason for adoption of the law does not truly protect a legitimate public purpose.

The burden this Act creates upon interstate commerce is tremendous. The law impedes the movement of commerce from state to state; interposes a substantial obstruction to the national policy of free commerce; and burdens interstate commerce with delays and increased costs due to rerouting.[11] Furthermore, people can serve jail time or pay a fine for entering into the State of South Carolina with urine.[12]

In Breard v. Alexandria, 341 U.S. 622, 71 S.Ct. 920, 95 L.Ed. 1233 (1951), the majority held that an ordinance prohibiting the solicitation of magazines from door to door at people's residences was a valid regulation and not an undue burden on interstate commerce. However, the strong dissent authored by Chief Justice Vinson joined by Justice Douglas makes a fervent point in that the statute is an undue burden on interstate commerce because it makes criminal a legitimate business. The dissent further recognizes that the majority reasons their order by classifying the local ordinance as a regulation rather than a prohibition. Chief Justice Vinson maintains that the local ordinance is a prohibition. The dissent further points out that one must look to the practical effect of the legislation rather than the original intent intended to burden interstate commerce. "We must guard against state action which in any form or under any guise, directly or indirectly burdens the prosecution of interstate business." Id. *citing* Baldwin v.

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[11] Raymond Motor Transp. v. Rice, 434 U.S. 429, 98 S.Ct. 787, 54 L.Ed. 2d 664 (1978); Bibb v. Navajo Freight Lines, 359 U.S. 520, 79 S.Ct. 962, 3 L.Ed. 2d 1003 (1959).

[12] First offense a person must be fined no more than five thousand dollars or imprisoned not more than three years, or both; and second offense or subsequent offense, is guilty of a felony and fined not more than ten thousand dollars or imprisoned not more than five years or both. S.C. Ann. 16-13-470 (B)(1) & (2) (Supp. 2000).

G.A.F. Seelig, Inc., 294 U.S. 511, 522, 55 S.Ct. 497, 500, 79 L.Ed. 1032 (1935).

Therefore, the Court should find that this statute violates the Commerce Clause of the Constitution by prohibiting commerce into the state of South Carolina and also by interfering with the national interest and burden on interstate commerce. The Court should further find that this burden significantly outweighs the state's rationalization for enacting such idle legislation.

III. THIS COURT SHOULD GRANT CERTIORARI BECAUSE THE ACT VIOLATES PETITIONER'S SUBSTANTIVE DUE PROCESS RIGHTS, UNDER THE FOURTEENTH AMENDMENT OF THE CONSTITUTION.

A. Overview of Substantive Due Process.

The Act violates the Petitioner's Substantive Due Process rights. The Fourteenth Amendment of the United States Constitution provides that "no state shall . . . deny to any person within its jurisdiction Equal Protection on the laws." U.S. CONST. amend. XIV. Substantive Due Process assures that a law will be fair and reasonable and not arbitrary, and should be applied where a law affects the rights of all persons with respect to a specific activity. Nebbia v. New York, 291 U.S. 502, 54 S.Ct. 505, 78 L.Ed. 940 (1934)

B. The Act fails under the Strict Scrutiny Test.

Strict scrutiny applies when government legislates on the basis of suspect classification, fundamental rights or protected First Amendment rights. Petitioner asserts that South Carolina Code Ann § 16-13-470 infringes upon his First Amendment rights. The impact of the Act prohibits him from expressing his ideas regarding the government's

interference with individuals' Fourth Amendment rights. Petitioner believes that a urine test is an invalid search into a person's bodily fluids that does not meet the threshold requirement of sufficient probable cause. Petitioner also asserts that an employer may find out private information from a urine test that they otherwise would not be able to have access to, such as pregnancy, mental disorders, prescription medications, and other medical conditions. Petitioner realizes the potential abuse of urine tests and strongly opposes their use due to the fact that there are less intrusive means to discern whether a person is impaired and is not able to safely work due to that impairment. Petitioner feels that a urine test is such an inadequate tool for determining impairment on employees that the test should not be used by employers. Petitioner's strong feelings regarding his beliefs have led to his promoting his own urine for sale over the internet. On his website[13] Petitioner does not encourage drug use nor does he encourage employees to defraud their employers. Petitioner's packaging is a further statement of his fervent beliefs. He packets his product in the same manner regardless of the intent of the individual purchasing the urine. Some customers may purchase the urine in support of the same beliefs as Petitioner, some for conversation, others for mere shock value; but regardless of why they purchase the urine, Petitioner has a constitutional right to be able to express his opinions and beliefs in a manner that is not destructive to the public. Petitioner is not forcing anyone to purchase his product, nor is he forcing anyone to pay attention to his beliefs. Furthermore, our society and judicial systems have recognized and protected other forms of expression that may be offensive to people such as Marijuana leaves on shirts and bumper stickers, offensive lyrics that talk about killing cops, or the right to burn a flag in public protest.

Therefore, if the Court acknowledges that Petitioner's First Amendment Right of Freedom of Expression is being impacted by the Act, then the correct standard in evaluating the statute should be strict scrutiny.

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[13] Privacy Protection Services at www.privacypro.com

Under the strict scrutiny standard, the burden of persuasion is on the government to prove that the measure being challenged is **necessary** to further a **compelling** interest.[14] The word "necessary" is defined as not having a less restrictive alternative means available. Board of Trustees v. Fox, 492 U.S. 469, 109 S.Ct. 3028, 106 L.Ed. 2d388 (1989). South Carolina declares their "compelling interest" is to promote a "safe work environment". Curtis, 345 S.C. 557. As discussed above, there are other less intrusive measures available to promote work place safety than broad prohibition on the sale, distribution, or transportation of urine. The State of South Carolina may well suggest that this is not the correct analysis in addressing the strict scrutiny standard to Petitioner's claim. They will most likely propose that Petitioner is permitted to sell his urine, just not for the purpose of defrauding drug or alcohol test, and therefore this is the least restrictive mean. The least restrictive mean should be linked to the "compelling state interest," and surely the State of South Carolina is not arguing their "compelling state interest" is to limit the sale of Petitioner's urine.[15] Moreover, the onus is on the government to prove its burden under the strict scrutiny analysis, and typically in cases where strict scrutiny is applied the law is found to be invalid. Bernal, *supra* 467 U.S. 216.

The South Carolina Supreme Court erred in finding that the statute ensures drug screening is effective when there was no evidence presented to support that contention. The Court is correct in stating that drug screening has been held lawful in certain limited situations. The constitutionality of drug screening does not, however, extend to this statute which does not serve to protect the

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[14] Bernal v. Fainter, 467 U.S. 216, 104 S.Ct. 2312, 81 L.Ed. 2d 175 (1984) *citing* Gunther, "The Supreme Court, 1971 Term - - Foreword: In Search of Evolving Doctrine of a Changing Court: A Model for a Newer Equal Protection." 86 Harv. L. Rev. 1, 8 (1972).

[15] In R.A.V. v. St. Paul, 505 U.S. 377, 112 S.Ct. 2538, 120 L.Ed. 2d 305 (1992), the Court correlated "compelling state interest" with the least restrictive alternative, when they posed, "The dispositive question is whether content discrimination is **reasonably necessary** to achieve St. Paul's . . ."

general safety and welfare of the public. No evidence has been presented that the Petitioner's business actually serves to defraud drug tests or that the use of his product affects workplace safety. In fact, the drug screening tests do not indicate impairment at all and are therefore not useful for establishing problems with job performance or safety. One might concede that such application for defrauding tests for safety sensitive positions might be of public concern. However, the blanket provisions of this Act are appallingly unrelated to a public purpose.

The South Carolina Supreme Court also erred in generally deriving the purpose of the statute in the absence of a legislative history that reflects such purpose. The lower courts stated that the General Assembly had determined that the statute is necessary to protect the public interest in a safe workplace; however, there is no evidence to support that finding. The only public purpose propounded by the State is the unsupported finding of Judge Ervin denying the temporary injunction.

C. The Act also fails the Rational Basis Test.

If this Court finds that Petitioner is not asserting a valid First Amendment violation, then the Court should apply a rational basis standard. The rational basis standard requires that the law cannot be arbitrary or unreasonable, in other words the state's purpose must be legitimate for enacting the law. Lyng v. Int'l Union, 485 U.S. 360, 108 S.Ct. 1184, 99 L.Ed. 2d 380 (1987).

The Respondents assert that the purpose for enacting South Carolina Code Ann. §16-13-470, was to promote and establish a "safe work environment." The statute does not refer to a limited application in work environment situations. Furthermore, the Attorney General and the Supreme Court of South Carolina have both recognized the purpose of the Act as promoting a "safe work environment." However, there is no evidence, statistics or studies linking urine testing and workplace safety. South Carolina's work force is labor-intensive and largely

comprised of manufacturing, construction and agricultural type positions. Therefore, the government's interest in employees with **safety-sensitive jobs** is not applicable. *See* Skinner, 489 U.S. at 630. Employees in the State that have highly sensitive job functions such as federal agents, armed forces personnel, or employees at nuclear power plants are subject to federal regulations, including federal drug testing policies.

South Carolina's Legislature is free to enact regulations as to the manner in which drug and alcohol tests are performed on their employees because there is a greater interest regarding that employer-employee relationship. However, in the present case, the government is interfering with and mandating the conduct that must take place between private individuals and private employers. It is difficult to ascertain the State's interest in that private relationship without any evidence that a problem exists and that this Act impacts that problem in any way. The government is only speculating as to potential problems that may exist in the private workforce.

No part of the legislation reflects a reasonable and rational relation to a legitimate public purpose. If the State may not order urinalysis without reasonable suspicion, it may not prohibit the conduct set forth in the Act to protect private urinalysis without reasonable suspicion. Furthermore, no evidence has been presented by the Respondents to support the proposition that this Act protects a legitimate public purpose. The Respondents failed to submit even affidavits showing how this Act will serve to lessen drug use in the workplace or in any way to promote the safety, health, or welfare of the citizens of this State.

Petitioner does not debate that drugs can be problematic in our society, but Respondents have failed to provide evidence that this Act would prevent drug or alcohol abuse in the workplace. Furthermore, they offer no explanation to rebut the presumption that a positive drug test does not indicate that the individual is currently impaired by any substance.

Above all, urine testing is an invasive step into an individual's private life. Urine testing has numerous pitfalls including inaccuracy, false detections, and inability to adequately test job performance. In addition, there are other measures that can be implemented that are less intrusive such as performance testing, eye scans, enhanced supervision, and detection of individuals with the potential need for counseling. Giving states the ability to pass any laws they choose in the name of promotion of workplace safety has dangerous implications. Carried out along this Act's line of reasoning, states could proscribe any conduct they wished simply by stating a tenuous connection to drug use.

IV. THIS COURT SHOULD GRANT CERTIORARI BECAUSE THE ACT VIOLATES THE PETITIONER'S PROCEDURAL DUE PROCESS RIGHTS UNDER THE FOURTEENTH AMENDMENT OF THE CONSTITUTION.

The Act violates the Petitioner's Procedural Due Process rights. A violation of Procedural Due Process occurs when an individual's deprivation of life, liberty or property without the proper procedural safeguards. Carey v. Piphers, 435 U.S. 247, 98 S.Ct. 1042, 55 L.Ed. 2d 252 (1978). The essential requirement of Procedural Due Process is that fair notice be given to those whom the law applies, along with providing proper adjudication standards for enforcing the law. *See* Leary v. U.S., 395 U.S. 6, 89 S.Ct. 1532, 23 L.E.2d 57 (1969). A statute may be pronounced invalid under two theories. First, the statute may be unconstitutional on its face. *See* Papachristou v. Jacksonville, 405 U.S. 156, 92 S.Ct. 839, 31 L.Ed. 2d 110 (1972); Smith v. Goguen, 415 U.S. 566, 94 S.Ct. 1242, 39 L.Ed. 2d 605 (1974). Second, the statute could be applied to both prohibitable and protective conduct. If a law's valuable effects are outweighed by the potential general way that it is applied, the law is found to

be unconstitutional as applied. *See* United States v. Grace, 461 U.S. 171, 103 S.Ct. 1702, 75 L.Ed. 2d 736 (1983). The subject test violates Petitioner's Procedural Due Process rights because it is overbroad, vague and is subject to selective enforcement.

A. The Statute as Enacted is overbroad and vague.

A statute is overbroad if in addition to proscribing activities which may constitutionally be forbidden, it also sweeps within its coverage, speech or conduct which is protected. Thornhill v. Alabama, 310 U.S. 88, 60 S.Ct. 736, 84 L.Ed. 1093 (1940). Vague laws impact persons either by their uncertainty as to whether they are within the scope of the act or in regard to the applicable tests to ascertain guilt. Winters v. New York, 333 U.S. 507, 68 S.Ct. 665, 92 L.Ed. 840 (1948). *Cf.* Colten v. Kentucky, 407 U.S. 104, 92 S.Ct. 1953, 32 L.Ed. 2d 584 (1972). Generally a vague statute that regulates First Amendment rights will be pronounced wholly void. Winters, 333 U.S. 507, 509-510; Thornhill, 310 U.S. 88.

The requirement that crimes be defined with appropriate definiteness, which has been referred to as a fundamental common-law concept, is now generally held to be an essential element of due process of law. Grayned v. Rockford, 408 U.S. 104, 92 S.Ct. 2294, 33 L.Ed. 222 (1972). The underlying principle is that all persons are entitled to be informed as to what the state commands or forbids, and no one should be required, at peril of life, liberty or property, to speculate as to the meaning of penal statutes. Id. When persons of common intelligence must necessarily guess at the meaning of the statute and differ as to its application, the statute is vague, and therefore invalid. Connally v. Gen. Constr. Co., 269 U.S. 385, 46 S.Ct. 126, 70 L.Ed. 332 (1926). And no obedience may be exacted to a rule or standard that is so vague and indefinite as to be really no rule or standard at all. A. B. Small Co. v. American Sugar Ref. Co., 267 U.S. 233, 45 S.Ct. 295, 69 L.Ed. 589 (1925).

The standard of certainty required is higher in statutes punishing for offenses than in the case of those depending primarily upon civil actions. The vice of unconstitutional vagueness becomes aggravated where a statute operates to inhibit the exercise of individual freedoms effectively guaranteed by State and Federal Constitutions. Id.[16]

Here we have a statute that is devoid of any definitions.[17] It doesn't even define that the urine must be human or otherwise. It fails to define what it means by defrauding a drug or alcohol test. Applied broadly if one attempted to conceal their partaking of hypertensive drugs, one would be guilty of this offense. Of course, section 16-13-470 does not limit its application to drugs that impair. It apparently applies to tests for any type of drugs whether legal or not.

South Carolina attempts to mitigate the effect of the Act by stating that Petitioner is able to sell his urine, just not for the purpose of defrauding a drug or alcohol screening test. However, this argument is implausible due to the fact that there is no practical way to enforce the statute.[18] The Supreme Court of South Carolina stated that the packaging can be used as circumstantial evidence and therefore a jury could use circumstantial evidence to infer intent. Curtis, 345 S.C. 557. Yet, Petitioner packages his urine in the same manner with the same materials regardless of who purchases the urine. Our government does not require those who sell alcohol to ask their customers if they intend to get drunk and drive, nor do they require those who sell bullets or guns to ask their customers if they intend to kill someone. The burden of asking customers their intended uses of the product is extreme, unproductive and unconstitutional.

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[16] *See also,* Cramp v. Bd. of Pub. Instruction, 368 U.S. 278, 82 S.Ct. 275, 7 L.Ed.2d 285 (1961); Winters, 333 U.S. 507, Scull v. Virginia, 359 U.S. 344, 79 S.Ct. 838, 3 L.Ed.2d 865 (1959).

[17] For example section 16-13-470 does not define the terms, "defraud", "spike", "foil", "adulteration" and "other bodily fluids".

[18] See the "Selective Enforcement" section *infra* for a more developed explanation.

South Carolina Code Ann. §16-13-470 does not properly notify those persons who may be affected. Regardless of the original motive behind the statute, it is impossible to be on notice that it is a criminal act to aid another in "defrauding" an underlying act which is not itself criminal. In other words, it is not practical for one to think that their act is criminal when the act they are alleged to aid in covering up is not a crime.

South Carolina Code Ann. § 41-1-15 states that a person who tests positive in a drug test at work is not subject to criminal prosecution. S.C. Code Ann. 41-1-15 (Supp. 2000). App. *infra* at 35a. Yet, the person who sells urine used in a drug test is criminally liable. Furthermore, the Act does not specifically address work place safety, rather it is aimed only at halting Petitioner's business. There are no public consequences to testing positive to a drug test administered on the job. In fact, employers may only release information of a positive drug result to certain enumerated people. Id. The Legislature has imposed a public consequence, however, for "defrauding a drug or alcohol screening test." This public consequence also extends to anyone using or selling any substance which may alter the results of a drug or alcohol screening tests. If the Legislature truly had an interest in preventing drug use in the workplace, it would impose a criminal penalty for testing positive on a drug test administered by an employer

Statutes that are vague and overbroad must have a "chilling effect." The "chilling effect" that the Act will have is that people will forego a protected activity rather than partake in an activity and violate the law. *See* Arnett v. Kennedy, 416 U.S. 134, 94 S.Ct. 1633, 40 L.E.2d 15 (1974); Secretary of State of Maryland v. Munson Co., 467 U.S. 947, 104 S.Ct. 2839, 81 L.Ed. 2d 786 (1984). The Act discourages individuals from expressing their First Amendment rights in order to prevent possible a violation of section 16-13-470.

Therefore, section 16-13-470 should be struck down in its entirety as unconstitutional.

B. The Act is subject to Selective Enforcement.

The Act should be struck down because it is subject to selective enforcement. Selective enforcement occurs when certain classes of people or certain points of view are discriminated against. Smith v. Goguen, 415 U.S. 566. The risk is that when a statute is overbroad or vague, such as this one, it permits officials not only the opportunity to treat people differently but also the chance to violate the constitutional rights of one person without violating those of another. Overbroad and vague laws impermissibly delegate basic policy matters to policemen, judges and juries for resolution on a subjective basis. Grayned, 408 U.S. 104, 108-09, Hoffman Estates v. Flipside, 455 U.S. 489, 102 S.Ct. 1186, 71 L.Ed. 362 (1982)

South Carolina Code Ann. §16-13-470 was written to include ALL persons who sell, distribute, transport, or use urine with the intent to defraud a drug test. Herbs, water, bleach and cleaners are used by individuals to defraud urine tests. Therefore, law enforcement would need to regulate the sale of these common household products to ensure that they are not violating the Act. The largest product used in defrauding a urine test is water. Therefore if someone purchases water, the distributor or the sales clerk should investigate and interrogate the customer as to their need or reason for the purchase. These common household products and herbs are packaged the same way regardless of the purpose of sale, just as Petitioner chooses to package his product. The government is placing a burden on one person, Petitioner, who is selling a product that may or may not be used to defraud a urine test, but not placing that burden on others who sell other products that may be used for that same purpose. If a water distributor has the same beliefs about the Fourth Amendment as Petitioner; and, therefore, chooses to place a marijuana leaf on the bottle, does that mean that his intent to defraud a drug or alcohol test may be inferred from the way he packages his water?

In Papachristou, *supra* 405 U.S. 156, the Supreme Court struck down a vagrancy law for being vague. The law stated that the persons who shall be punished are

> "dissolute persons who go about begging . . . common night walkers, . . . common railers and brawlers, persons wandering or strolling around from place to place without any lawful purpose or object, habitual loafers,. . . persons neglecting all lawful business and habitually spending their time by frequenting houses of ill fame, gaming houses or places where alcoholic beverages are sold and served, persons able to work but habitually living upon earnings of their wives and minor children."

The Court reasoned that the statute violated Procedural Due Process for vagueness on several principles. First, the statute did not give fair notice. Second, there was no requirement of specific intent to commit an unlawful act. Third, the statute encouraged and permitted arbitrary and erratic arrests and convictions. Fourth, too much discretion was given to police to selectively arrest individuals. Fifth, the statute criminalized activities which by modern standards are innocent. Id.

The Court's reasoning and application in Papachristou can be easily applied to this Act. As previously discussed, the notice of prohibited activities is not clear. Additionally, specific intent can be inferred by circumstantial evidence, and the statute encourages erratic arrests based on perceived intent to defraud.

Furthermore, it is almost impossible to enforce the statute as it is written. There are several different products, some very common and are in everyone's household, that are used more frequently to defraud drug tests. Under the Act as written, the police may choose who they want to

arrest based on their perception of individuals attempting to defraud drug tests. Finally, the statute is criminalizing an individual's right to freedom of expression. "At the heart of the First Amendment is the recognition of the fundamental importance of the free flow of ideas and opinions on matters of public concern." Hustler Magazine v. Flynt, 485 U.S. 46, 108 S.Ct. 876, 99 L.Ed. 2d 41 (1988). Petitioner is well within his constitutional right to express his ideas and beliefs about urine testing and its ramifications, through packaging a natural product.

Therefore, this Court should find that the Act is unconstitutional.

CONCLUSION

Justice Scalia in the Von Raab dissent, paraphrased Winston Churchill who said, "all this contains much that is obviously true and much that is relevant; unfortunately what is obviously true is not relevant, and what is relevant is not obviously true." Von Raab, 489 U.S. at 682. The State of South Carolina created this statute to prevent Petitioner from expressing his beliefs on the Fourth Amendment and also to prevent Petitioner from selling his product. Petitioner was in business for years before section 16-13-470 was enacted. Senator Thompson found out about the business and was offended. "The greatest dangers to liberty lurk in insidious encroachment by men of zeal, well meaning but without understanding." Olmstead v. U.S., 277 U.S. 438 at 485, 48 S.Ct. 564, 72 L.Ed. 944 (1928). South Carolina's Supreme Court fails to recognize that **there is no evidence for the need to enact the legislation**. There has been no investigation, research, or committee formed as to how to react to the problem of an unsafe work environment. There has been no viewing of editorials, press releases or public debate demonstrating concern for an unsafe environment in South Carolina. There has been no evidence that drug and alcohol testing at work deters people from being intoxicated at work. There has been no demonstration of a legitimate public purpose. If South Carolina genuinely

was concerned about establishing and promoting a "safe work environment", than they would also mandate that employers establish an intervention and treatment program. Furthermore, the South Carolina Legislature could enact legislation that would address other contributing factors that would promote a safe work environment such as free counseling with those having emotional problems, a way to handle those who are sleep deprived, and promoting and educating people on healthier habits related to proper nutrition and exercise.

South Carolina Code Ann. § 16-13-470 infringes on interstate commerce because it acts as a complete prohibition of interstate commerce and not a legitimate restriction on commerce. It violates Petitioner's First Amendment rights. Furthermore the statute does not provide adequate notice and leaves the criminal justice system free to selectively enforce the law. Therefore, this Court should find that the Act is unconstitutional.

Respectfully submitted,

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ATTORNEYS FOR THE PETITIONER
Kenneth E. Curtis

November 5, 2001

APPENDIX A

[Filed July 17, 2001]

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Kenneth E. Curtis, Individually and d/b/a Privacy Protection Services, Appellant,

v.

The State of South Carolina, The South Carolina General Assembly, Charles Molony Condon, as Attorney General for the State of South Carolina, Robert M. Ariail as 13th Judicial Circuit Solicitor, The South Carolina Law Enforcement Division,
and John Mack Brown,
as Sheriff for Greenville County. Respondents.

APPEAL FROM GREENVILLE COUNTY

THOMAS J. ERVIN, Special Circuit Court Judge

Opinion No. 25319
Heard October 4, 2000 – Filed July 17, 2001

AFFIRMED

Robert C. Childs, III and Laura W. H. Teer, both of Mitchell, Bouton, Yokel & Childs, of Greenville, for appellant.

Attorney General Charles M. Condon, Senior

Assistant Attorney General Nathan Kaminski, Jr., and Assistant Attorney General Christie Newman Barrett, all of Columbia, for respondents.

CHIEF JUSTICE TOAL: Kenneth E. Curtis ("Curtis") appeals the trial court's denial of a temporary injunction concerning the enforcement of S.C. Code Ann. § 16-13-470 (Supp. 2000), which prohibits the selling of urine with the intent to defraud a drug screening test. We affirm.

FACTS/PROCEDURAL HISTORY

In 1996, Curtis started an internet business known as Privacy Protection Services.[1] Through this business, Curtis sells his own urine, which is certified as drug and adulterant free, along with a "urine test substitution kit." Each urine test substitution kit comes with Curtis' urine, a pouch, a tube, and a chemical hand warmer device. Because proper temperature is critical for acceptance at any urine testing site, each kit comes with "chemically reactive supplemental heat sources" and a temperature monitoring system that insures proper acceptance temperature. Furthermore, the kit can be easily concealed on the body and can be used in a natural urinating position, which means it cannot be detected even if directly observed.[2] According to Privacy Protection Services' website: "Our complete urine test substitution kits allow

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[1] Privacy Protection Services can be found at www.privacypro.com.

[2] According to the website, each kit contains a small reservoir pouch (about the size of a pack of cigarettes) that has a small diameter tube that can be routed to the genital area. The tube has a flow/stop clip that makes dispensing easy and natural. The kit can be stored indefinitely or kept on hand in case of random testing. These complete kits provide everything needed for two urine testing procedures.

anyone, regardless of substance intake, to pass any urinalysis within minutes."[3]

Based on his website and his June 17, 1999, affidavit, Curtis maintains his primary objection to urine testing by employers is they do not merely test for drugs, they also test for pregnancy, diabetes, cigarette smoking, hypertension, and other diseases or genetic traits. He believes this type of testing by employers constitutes an infringement on the privacy rights of prospective employees and leads to access of private information.

On June 11, 1999, the Governor of South Carolina signed Senate Bill 277, which amended S.C. Code Ann. § 16-13-470 "to provide that selling urine with the intent to defraud a drug screening is a felony." Under section 16-13-470, the penalty for the first offense is a fine of not more than five thousand dollars and imprisonment of not more than three years, or both. The penalty for a second or subsequent offense is a fine of not more than ten thousand dollars or imprisonment of not more than five years, or both. S.C. Code Ann. § 16-13-470 (Supp. 2000). Pursuant to the statute, intent is presumed if a heating element or any other device used to thwart a drug-screening test accompanies the sale. *Id.*

On June 18, 1999, Curtis filed a Motion for an *Ex Parte* Temporary Restraining Order and a Motion for a Temporary Injunction. The trial judge granted the *Ex Parte* Temporary Restraining Order on June 18, 1999. On June 30, 1999, the trial court denied the Motion for a Temporary

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[3] In Curtis' Brief he maintains "he does not tout the product as a means to avoid detection of drug or alcohol abuse." However, the website describes how one can conceal the kit in any drug test. The website also includes a cartoon depicting a man urinating on a law enforcement officer. The cartoon is accompanied by the following quotation: "South Carolina law makers are pinching the weenie but can't stop the flow!"

Injunction and issued a formal Order. Curtis' Motion for Reconsideration was denied and this appeal followed.

On September 20, 2000, the Attorney General filed a Motion to Dismiss Appeal as Moot and a Motion to Supplement Record on Appeal with Memorandum in Support Thereof. On August 18,2000, the trial judge entered an order ruling on the merits of this case, holding section 16-13-470 constitutional and a legitimate exercise of the State's police powers. The Attorney General moves this Court to dismiss the appeal of the denial of a temporary injunction because the appeal is moot. According to the Attorney General's Motion, any order issued by this Court will be advisory and will have no practical effect on an existing controversy.

The following issues are before this Court on appeal:

I. Since the trial court has issued an order on the merits of this case, should this Court dismiss the appeal of the denial of a temporary injunction because the trial court's order renders the appeal moot?

II. Did the trial court err by holding Curtis is not entitled to a temporary injunction against the enforcement of section 16-13-470 when Curtis failed to establish that he will suffer irreparable harm or that he has no adequate remedy at law?

III. Did the trial court err in holding Curtis is not likely to succeed on the merits?

A. Does section 16-13-470 create an impermissible presumption of guilt?

B. Is section 16-13-470 vague, overly broad, and ambiguous?

C. What legitimate public purpose does section 16-13-470 protect?

D. Does section 16-13-470 infringe upon First Amendment rights?

E. Does section 16-13-470 violate equal protection?

F. Does section 16-13-470 constitute cruel and unusual punishment?

G. Does section 16-13-470 impermissibly interfere with interstate commerce?

H. Does section 16-13-470 abridge the right to privacy?

I. Does section 16-13-470 violate the Fourth Amendment?

IV. Did the trial court err in reaching the merits on a motion for
temporary relief?

LAW/ANALYSIS

I. Mootness

The Attorney General argues the appeal in this case is moot and any order issued by this Court will be advisory because the trial court has issued an order on the merits.[4]

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4 We granted the Attorney General's motion to supplement the Record on Appeal with the trial judge's order on the merits.

An appellate court will not pass on moot and academic questions or make an adjudication where there remains no actual controversy. *Jackson* v. *State*, .331 S.C. 486, 489 S.E.2d 915 (1997). Moot appeals differ from unripe appeals in that moot appeals result when intervening events render a case nonjusticiable. *See* Jean Hoefer Toal, Shahin Vafai & Robert A. Muckenfuss, *Appellate Practice in South Carolina* 122 (1999). "A case becomes moot when judgment, if rendered, will have no practical legal effect upon [the] existing controversy. This is true when some event occurs making it impossible for [the] reviewing Court to grant effectual relief." *Mathis* v. *South Carolina State Highway Dep't*, 260 S.C. 344, 346, 195 S.E.2d 713,715 (1973).

In the civil context, there are three general exceptions to the mootness doctrine. First, an appellate court can take jurisdiction, despite mootness, if the issue raised is capable of repetition but evading review. *See generally Byrd* v. *Irmo High Sch.*, 321 S.C. 426, 468 S.E.2d 861 (1996); *Citizen Awareness Regarding Educ.* v. *Calhoun County Publ'g, Inc.*, 406 S.E.2d 65 (W. Va. Ct. App. 1991) (holding an appellate court could consider newspaper's appeal from trial court's injunction compelling newspaper to publish political action advertisement even though case was moot because issue was capable of repetition yet evaded review). Second, an appellate court may decide questions of imperative and manifest urgency to establish a rule for future conduct in matters of important public interest. *See generally Berry* v. *Zahler*, 220 S.C. 86, 66 S.E.2d 459 (1951) (the court recognized that questions of public interest originally encompassed in an action should be decided for future guidance however abstract or moot they may have become in the immediate contest). Finally, if a decision by the trial court may affect future events, or have collateral consequences for the parties, an appeal from that decision is not moot, even though the appellate court cannot give effective relief in the present case. *See* 5 AM. JUR. 2D *Appellate Review* § 649 (1995).

An order or decree in a court of common pleas granting, continuing, modifying, or refusing an injunction is immediately appealable. S.C. Code Ann. § 14-3-330(4) (Supp. 2000); *Appeal of Paslay*, 230 S.C. 55, 94 S.E.2d 57 (1956) (appeal lay from the restraining order or temporary injunction). However, "[t]he rule that an appellate court limits its review to the issues necessary to a proper disposition of the appeal, and will not consider immaterial or moot questions, applies when reviewing decrees and orders relating to injunctions." 42 AM. JUR. 2D *Injunctions* § 335 (2000). Where only injunctive relief is sought and the need for that relief has ceased to be a justiciable issue, an appellate court should not review the merits, or consider the granting of a new trial after it has become impossible to have a new trial in the case. *See generally State ex rel. Matthews* v. *Eastin*, 297 P.2d 170 (Kan. 1956).

Texas courts have held an appeal of a temporary injunction is moot where a trial court renders final judgment while the appeal is pending. *See Lowe* v. *Farm Credit Bank of Texas*, 2 S.W.3d 293 (Tex. Ct. App. 1999); *Save Our Springs Alliance* v. *Austin Indep. Sch. Dist.*, 973 S.W.2d 378 (Tex. Ct. App. 1998) (trial court's final judgment rendered the appeal of the temporary injunction moot). According to Texas case law, dismissing an appeal from a temporary injunction after it has been rendered moot by final judgment is necessary to prevent premature review of the merits of the case. *Isuani* v. *Manske-Sheffield Radiology Group, P.A.*, 802 S.W.2d 235 (Tex. 1991).

The trial judge's June 30, 1999, Order renders this case nonjusticiable because any decision by this Court will not have a practical legal effect on the temporary injunction. The sole object of a temporary injunction is to preserve the subject of the controversy in its condition at the time of the order until opportunity is offered for full and deliberate trial investigation. *Epps* v. *Bryant*, 218 S.C. 359, 62 S.E.2d 832 (1950). Temporary injunctions are interlocutory, tentative, and impermanent and are superseded by the final judgment rendered on the merits. 42 AM. JUR. 2D *Injunctions* § 294 (2000). Thus, temporary injunctions "remain in force only

until, and expire upon, the entry of the final judgment and are not enforceable after the final judgment has been entered." *Id.*

Curtis has received a full investigation of his claim because the trial court has rendered a decision on the merits of this case. Therefore, the temporary injunction has expired and the issue is moot. However, we signed an Order taking the appeal on its merits from the Court of Appeals. We consolidated the merits appeal with the temporary injunction appeal. For the sake of judicial economy, we address the merits.

II. Success on the Merits

This Court has a limited scope of review in cases involving a constitutional challenge to a statute because all statutes are presumed constitutional and, if possible, will be construed to render them valid. *Davis* v. *County of Greenville,* 322 S.C. 73, 470 S.E.2d 94 (1996). "A possible constitutional construction must prevail over an unconstitutional interpretation." *Westvaco Corp.* v. *South Carolina Dep't of Revenue,* 321 S.C. 59, 467 S.E.2d 739 (1995). Further, a legislative act will not be declared unconstitutional unless its repugnance to the Constitution is clear and beyond a reasonable doubt. *Id.* Because Curtis does not establish an infringement of a constitutional right, the trial court was correct in holding he is not likely to succeed on the merits of the following constitutional challenges.

A. Impermissible Presumption of Guilt

Curtis argues section 16-13-470 unconstitutionally shifts the burden of proof on the issue of criminal intent to the defendant. We agree. Specifically, section 16-13-470 states, "[i]ntent is presumed if a heating element or any

other device used to thwart a drug-screening test accompanies the sale, giving,
distribution, or marketing of urine or if instructions which provide a method for thwarting a drug-screening test accompany the sale, giving, distribution, or marketing of urine."

Section 16-13-470 unconstitutionally shifts the burden of proof to the criminal defendant because it states that "intent is presumed" when certain conditions are met. This language violates the United States Supreme Court's holding in *Sandstrom* v. *Montana*, 442 U.S. 510, 99 S. Ct. 2450, 61 L. Ed. 2d 39 (1979) because it acts as a conclusive presumption. In *Sandstrom*, the United States Supreme Court held the defendant's due process rights were violated by a jury instruction on the issue of intent where the trial judge instructed, "the law presumes that a person intends the ordinary consequences of his voluntary acts." According to the Supreme Court, the jury in *Sandstrom* may have interpreted the trial judge's instruction as a burden shifting presumption or a conclusive presumption. This jury instruction violates the Fifth and Fourteenth Amendment's due process requirement that the State prove every element of a crime beyond a reasonable doubt. In finding such a presumptive instruction unconstitutional, the Supreme Court found where intent is an element of the crime charged, it follows that the trial court may not withdraw or prejudge the issue by instructing the jury the law raises a presumption of intent from an act. *Sandstrom, supra.* This invades the fact finding responsibility of the jury.

A statute may be constitutional and valid in part and unconstitutional and invalid in part. *Thayer* v. *South Carolina Tax Comm'n*, 307 S.C. 6, 413 S.E.2d 810 (1992). We find the unconstitutional intent language is severable from the remainder of section 16-13-470. The test for severability is whether the constitutional portion of the statute remains complete in itself, wholly independent of that which is rejected, and is of such a character that it may fairly be presumed the legislature would have passed it independent

of that which conflicts with the constitution. *Joytime Distribs. & Amusement Co.* v. *State*, 338 S.C. 634, 648-649, 528 S.E.2d 647, 654 (1999) (citations omitted). "When the residue of an Act, sans that portion found to be unconstitutional, is capable of being executed in accordance with the Legislative intent, independent of the rejected portion, the Act as a whole should not be stricken as being in violation of a Constitutional Provision." *Id.* (quoting *Dean* v. *Timmerman*, 234 S.C. 35, 43, 106 S.E.2d 665, 669 (1959)).

We find the unconstitutional intent language is severable from the remainder of section 16-13-470. The remainder *of* the statute outlines the different unlawful ways a person can attempt to defraud a drug and alcohol screening test, using general language to describe intent. The remainder of the statute is complete without the intent presumption language because it allows the jury to infer intent from the circumstantial evidence presented at trial. We presume the legislature would have passed section 16-13-470 regardless of whether the presumption language was included. We, therefore, sever the unconstitutional presumption language from the rest of the statute.

B. Unconstitutionally Vague and Overbroad

Curtis aruges section 16-13-470 is unconstitutionally vague and overbroad. We disagree.

"The concept of vagueness or indefiniteness rests on the constitutional principle that procedural due process requires fair notice and proper standards for adjudication." *City of Beaufort v. Baker*, 315 S.C. 146, 152, 432 S.E.2d 470, 472 (1993). The constitutional standard for vagueness is the practical criterion of fair notice to those to whom the law applies. *Huber* v. *South Carolina State Bd. of Physical Therapy Exam'rs*, 316 S.C. 24, 446 S.E.2d 433 (1994). A law is unconstitutionally vague if it forbids or requires the doing of an act in terms so vague that a person of common intelligence must necessarily guess as to its meaning and differ as to its application. *Toussaint v. State Bd. of Med.*

Exam'rs, 303 S.C. 316, 400 S.E.2d 488 (1991). One to whose conduct the law clearly applies does not have standing to challenge it for vagueness. *Id.*

Although some of the terms in section 16-13-470 are undefined, the intent of the statute is clear on its face. The statute makes it unlawful to "sell, give away, distribute, or market urine. ..with the intent to defraud a drug or alcohol screening test." A person of ordinary intelligence seeking to obey the law will know, and is sufficiently warned of, the conduct the statute makes criminal. Curtis argues that section 16-13-470 is unconstitutionally vague because terms such as "foil," "spike," "defraud," "bodily fluids," and "adulterate" are not defined. However, all of these terms have common, ordinary meanings sufficient to proscribe conduct, and do not need to be specifically defined. *See State v. Hamilton,* 276 S.C. 173, 276 S.E.2d 784 (1981) (the fact that "force or coercion" was undefined by the statute did not render the statute vague or ambiguous because the words are of common, ordinary meaning and are sufficiently specific to proscribe the conduct). Further, all the Constitution requires is that the language convey sufficiently definite warnings as to the proscribed conduct when measured by common understanding and practices. *See State* v. *Solomon,* 245 S.C. 550, 141 S.E.2d 818 (1965).

C. Legitimate Public Purpose

Curtis argues section 16-13-470 serves no legitimate public purpose. He argues there is no legitimate public purpose in helping "private industry do urine testing that doesn't even reflect accurately on their consumption of substances and which has no relation to impairment of safety." Curtis also argues the Attorney General fails to submit affidavits demonstrating how section 16-13-470 will serve to lessen drug use in the workplace or in any way promote the safety, health, or welfare of the citizens of South Carolina. We disagree.

As noted in the trial court's Order, the United States Supreme Court has held drug testing of employees through urinalysis is lawful and constitutional. *See Skinner* v. *Railway Labor Executives' Ass'n*, 489 U.S. 602, 109 S. Ct. 1402, 103 L. Ed. 2d 639 (1989) (testing railway employees for drugs and alcohol after a serious accident was constitutional). The General Assembly has passed several statutes that permit random drug testing to further the public policy of a drug-free work environment. *See* S.C. Code Ann. § 38-73-500 (Supp. 2000) (provides a workers' compensation credit for random drug testing to provide incentive for employers to prevent drug use and work-related accidents); S.C. Code Ann. § 41-1-15 (Supp. 2000) (authorizing an establishment of drug prevention program in the workplace which includes a substance abuse testing program).

A statute making it unlawful to defraud a drug test furthers the public purpose of ensuring a drug-free workplace. Section 16-13-470 is a legitimate exercise of the State's police powers in regulating public safety and welfare. Furthermore, the public purpose of creating safety in the workplace outweighs any legitimate interest, if any, of Curtis in doing business.

D. First Amendment Rights

Curtis argues section 16-13-470 violates his right to free speech because it directly prohibits the expression of ideas relative to urine testing. We disagree.

Along with his urine, Curtis provides literature with instructions on how to defeat a drug test and literature regarding his political beliefs on drug testing. Section 16-13-470 does not prohibit Curtis from dispensing literature regarding his political beliefs on urine testing. Furthermore, we sever the provision from section 16-13-470 which states that intent will be presumed if "instructions which provide a method for thwarting a drug-screening test" accompanies the sale of his urine. We find the remaining statute does not infringe on Curtis' right to free speech.

E. Equal Protection

Curtis argues section 16-13-470 violates the Equal Protection Clause because it differentiates urine sales from the sale of herbal supplements and other products sold to mask drugs in one's urine.[5] We disagree.

The Equal Protection Clause provides: "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1. A classification does not violate the Equal Protection Clause if: (1) the classification bears a reasonable relation to the legislative purpose sought to be effected; (2) the members of the class are treated alike under similar circumstances and conditions; and (3) the classification rests on some reasonable basis. *Whaley v. Dorchester County Zoning Bd. of Appeals,* 337 S.C. 568, 524 S.E.2d 404 (1999). The determination of whether a classification is reasonable is initially one for the legislative body and will be sustained if it is not plainly arbitrary and there is a reasonable hypothesis to support it. *Id.* "The fact that the classification may result in some inequity does not render it unconstitutional." *Id.* (citing *Davis v. County of Greenville,* 313 S.C. 459, 465, 443 S.E.2d 383, 386 (1994)).

This case does not involve a suspect classification or a fundamental right, so the question under equal protection analysis is whether the legislation is rationally related to a legitimate state purpose. *Casbah, Inc.,* v. *Thone,* 651 F .2d 551 (8th Cir. 1981) (citing *Massachusetts Ed. of Ret.* v. *Murgia,* 427 U.S.. 307, 96 S. Ct. 2562, 49 L. Ed. 2d 520 (1976)). We find the classification of an individual who sells urine or an adulterant to defeat a drug test is rationally related to the legitimate state purpose of promoting a safe work environment. First, the classification is reasonably related to the legislative purpose of insuring the safety of the

[5] For example, Curtis argues the sale of water is not prohibited even thought it is the primary adulterant used to defeat urine tests.

workplace through the protection of drug testing programs. Second, all people who constitute the class are treated similarly. The classification rests on a reasonable basis and includes any person who sells a product intended to adulterate urine or other bodily fluid sample for the purposes of defrauding a drug or alcohol screening test. S.C. Code Ann. § 16-13-470(A)(5). Curtis' equal protection claims fails because all individuals who engage in conduct prohibited by section 16-3-470 are treated alike, regardless of whether they adulterate urine samples with herbal supplements or chemicals.

F. Cruel and Unusual Punishment

Curtis argues the sentence proscribed by section 16-13-470 constitutes cruel and unusual punishment in violation of the Eighth Amendment because the sentence is grossly disproportionate to the severity of the crime. We disagree.

The Eighth Amendment only prohibits sentences which are grossly out of proportion to the severity of the crime. *Yeargin* v. *South Carolina Dep't of Highways & Pub. Transp.*, 313 S.C. 387, 438 S.E.2d 234 (1993) (citations omitted). Pursuant to section 16-13-470, the punishment for a first offense misdemeanor conviction is a fine not more than five thousand dollars or imprisonment of not more than three years, or both. A second, or subsequent, conviction is a felony punishable by a fine not more than ten thousand dollars or imprisonment not more than three years, or both. This punishment is not inhumane or disproportionate to the severity of the crime. The trial court has discretion as to the amount of the fine or length of imprisonment. Moreover, section 16-13-470 does not preclude the sentencing authority from considering mitigating and aggravating circumstances in fashioning an appropriate sentence.

G. Interstate Commerce

Curtis argues section 16-13-470 prohibits the flow of interstate goods and impermissibly burdens interstate commerce. We disagree.

First, this case does not involve the commerce clause, it involves the legislature's exercise of its police powers to prohibit commerce that is intended to defraud South Carolina employers and create an unsafe work environment. Furthermore, section 16-13-470 does not unduly burden interstate commerce because it does not ban the sale of urine and other bodily fluids. It simply makes it unlawful for someone to sell, give away, distribute, or market urine with the *intent* to use the urine to defraud a drug or alcohol screening test.

H. Right to Privacy

Curtis argues he has a constitutional right to sell his urine. He also argues that South Carolina has placed itself in the unlawful position of monitoring urine testing. We disagree.

First, section 16-13-470 does not involve an act of surveillance by the State, it involves the commercialization of urine to defraud drug tests. Second, Curtis does not have standing to assert section 16-13-470 unconstitutionally invades the privacy rights of those who are subject to urine testing. *See Stone* v. *Salley*, 244 S.C. 531, 537, 137 S.E.2d 788, 790 (1964) *overruled on other grounds by R.L. Jordan Co.* v. *Boardman Petroleum, Inc.*, 338 S.C. 475, 527 S.E.2d 763 (2000) (holding a plaintiff "cannot obtain a decision as to the invalidity of [an] Act on the ground that it impairs the rights of others."). Finally, the statute does not prohibit Curtis from doing what he wants with his urine. He could even sell his urine for other purposes as long as he does not intend to defraud a drug or alcohol screening test.

III. Fourth Amendment

Curtis argues section 16-13-470 violates the Fourth Amendment. We disagree. In essence, Curtis attempts to assert the Fourth Amendment rights of his customers against drug testing in the workplace. First, Curtis does not have standing to assert the constitutional rights of his customers. *See Stone, supra.* Second, section 16-13-470 does not mandate drug testing, it simply makes it a crime to sell urine or other adulterants with the intent to defraud a drug test.

IV. The Merits

Curtis argues the trial court erred in reaching the merits on his Motion for Temporary Relief. We disagree.

In determining whether a temporary injunction should issue, the trial judge should not consider the merits of the case, except as they may enable the trial court to determine whether a prima facie showing has been made. *Transcon. Gas Pipe Line Corp.* v. *Porter,* 252 S.C. 478, 167 S.E.2d 313 (1969). When a prima facie showing has been made entitling the plaintiff to injunctive relief, a temporary injunction will be granted without regard to the ultimate termination of the case on the merits. *Id.* However, when a plaintiffs' prima facie case depends on an allegation that a statute in unconstitutional, the trial judge must consider the matter in determining the reasonable necessity for a temporary injunction. *Hutchison v. York County,* 86 S.C. 396, 68 S.E. 577 (1910). In order to reverse the refusal of a temporary injunction in such a case, this Court must review the constitutional question. *Id.*

A trial court may consider a case's merit to the extent necessary to determine whether a temporary injunction should issue. *Roberts v. Union County Bd. of Sch. Trs.,* 284 S.C. 299, 326 S.E.2d 163 (Ct. App. 1985). The trial court in this case found Curtis was not likely to succeed on the merits

because he had not established a valid infringement upon a fundamental constitutional right. Although the trial judge ruled on the merits of Curtis' constitutional arguments, it was necessary to determine the likelihood of success on the merits. Furthermore, according to *Hutchison, supra,* it was proper for the trial judge to consider the merits because Curtis' prima facie case depended on an allegation that section 16-13-470 was unconstitutional.

CONCLUSION

We sever the unconstitutional presumption language from section 16-13-470, affirm the trial court's order upholding the constitutionality of the remainder of section 16-13-470, and find section 16-13-470 is a valid exercise of the State's police powers.

MOORE, WALLER, BURNETT, JJ., concur. PLEICONES, J., concurring in result only.

APPENDIX B

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Kenneth E. Curtis,
Individually and d/b/a
Privacy Protection Services, Appellant,

v.

The State of South Carolina,
The South Carolina General
Assembly, Charles Molony Condon,
as Attorney General for the
State of South Carolina, Respondents.

APPEAL FROM GREENVILLE COUNTY

JUDGE ALISON R. LEE, Circuit Court Judge

Memorandum Opinion No. 2001-MO-060
Submitted September 27, 2001 – Filed October 12, 2001

AFFIRM AS MODIFIED

Robert C. Childs, III, and Laura W. H. Teer, both of Mitchell, Bouton, Yokel & Childs, of Greenville, for appellant.

Attorney General Charles M. Condon, Senior Assistant Attorney General Nathan Kaminski, Jr., and Assistant

Attorney General Christie Newman Barrett, all of Columbia, for respondents.

CHIEF JUSTICE TOAL: Kenneth Curtis, d/b/a Privacy Protection Services ("Appellant") appeals the trial court's ruling upholding the constitutionality of S.C. Code Ann. § 16-13-470 (Supp. 2000).

FACTUAL/PROCEDURAL BACKGROUND

On June 18, 1999, Appellant filed a Motion for an Ex Parte Temporary Restraining Order and a Motion for a Temporary Injunction seeking to enjoin the enforcement of S.C. Code Ann. § 16-13-470 ("Act"), which makes selling urine with the intent to defraud a drug screening test a felony. After a hearing, Judge Ervin, Circuit Court Judge, issued an Order on June 30, 1999, denying the Appellant's Motion for a temporary injunction. Appellant appealed Judge Ervin's Order, and that appeal was heard by this Court on October 4, 2000. This Court issued an opinion on July 17, 2001, affirming Judge Ervin's Order and finding section 16-13-470 constitutional after severing the "presumption" language from the remainder of the statute. *Curtis v. State*, 345 S.C. 557, 549 S.E.2d 591 (2001).

While the appeal before this Court was pending, Judge Henry Floyd conducted a hearing and ordered the proceedings below bifurcated with regard to the damages and constitutional issues. On May 2, 2000, Judge Alison Lee heard the merits of the case and ruled the statute was constitutional. Appellant now appeals Judge Lee's Order, and the issues before this Court are:

I. Did the trial court err in finding Appellant openly promoted his product for "cheating" employer mandated drug test and that Appellant was engaged in the business to assist individuals in defrauding employers?

II. Did the trial court err in finding the Act does not infringe upon a protected property right of the Appellant?

III. Does the Act create an impermissible presumption of guilt?

IV. Did the trial court err in finding the Act serves a legitimate public purpose?

V. Did the trial court err in failing to find the Act is vague, overly broad, and ambiguous?

VI. Did the trial court err in holding the Act does not violate Equal Protection?

VII. Did the trial court err in finding the Act does not infringe on Appellant's First Amendment Rights?

VIII. Did the trial court err in finding the Act did not constitute Cruel and Unusual Punishment in violation of the Eighth Amendment?

IX. Did the trial court err in finding the Act does not impermissibly interfere with interstate commerce?

X. Did the trial court err in finding the Act does not interfere with Appellant's Right to Privacy?

XI. Did the trial court err in finding the Act does not violate the Fourth Amendment?

LAW/ANALYSIS

Appellant argues the trial court erred in finding that Appellant openly promoted his product for "cheating" employer mandated drug tests and that Appellant was

engaged in the business of assisting individuals in defrauding employers. We disagree.

Judge Lee's ruling was on the constitutionality of the Act. This is a case brought by the Appellant against the state to enjoin the enforcement of the Act. This was not a criminal prosecution of Appellant. Judge Lee was not to determine whether Appellant would be guilty of violating the Act. Any observations Judge Lee made in her Order with respect to Appellant's intent when selling his urine were not part of her ruling on constitutionality. Therefore, they in no way affected her ruling on the Act's constitutionality.

Furthermore, Judge Lee's "fact" finding was supported by the record. In the "Factual Background" section of her August 9, 2000, Order, Judge Lee held: "Based upon the Internet site documents and news articles presented by the State, Curtis openly promotes the use of his products for the purpose of 'cheating' on employer mandated drug tests."

In an action at law, tried without a jury, a trial court's factual findings will not be disturbed on appeal unless there is no evidence in the record to reasonably support the trial judge's findings. *Crary v. Djebelli*, 329 S.C. 385, 496 S.E.2d 21 (1998); *Townes Assocs., Ltd. v. City of Greenville*, 266 S.C. 81, 221 S.E.2d 773 (1976). In the instant case, Judge Lee relied upon the Appellant's own website, and newspaper articles contained on Appellant's website when making her determination that Appellant promoted his products for the purpose of "cheating" on employer mandated drug tests. For example, the homepage of Appellant's website advertises "Complete urine test substitution kits allow anyone, regardless of substance intake, to pass any urinalysis within minutes." One of the newspaper articles on Appellant's site states, "Taking a drug test? Wanna cheat? One Greenville-based company helps people do just that." Kerry Eleveld, *Making Money on the Cheat; GSA Company Helps Employees Elude Drug Tests*, GSA Business, October 7, 1998. Therefore,

there is ample evidence in the record to support Judge Lee's finding.

Because Judge Lee's "fact finding" did not affect her ruling on the constitutionality of the Act and was supported by evidence in the record, we find no error.

II. Property Right

Appellant argues the trial court erred by failing to find that the Act infringes on a protected property right. We disagree.

In support of his argument that the right to pursue an occupation is a legitimate entitlement within the protective purview of the Due Process Clause, Appellant quotes *Truax v. Raich,* 36 S.Ct. 7, 239 U.S. 33, 60 L.Ed. 131 (1915). In *Truax,* the United States Supreme Court held, "It requires no argument to show that the right to work for a living *in the common occupations of the community* is of the very essence of the personal freedom and opportunity that it was the purpose of the [Fourteenth] Amendment to secure." *Id.* at 10, 239 U.S. at 41 (emphasis added). However, Appellant is not engaged in a "common occupation of the community."[1]

South Carolina does recognize the right to pursue "lawful" occupations. *See Frost v. Berkeley Phosphate Co.,* 42 S.C. 402, 20 S.E. 280 (1894). However, there is no state case law which grants an individual the right to engage in an unlawful occupation. In this case, the state legislature, as it

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[1] The only other part of Appellant's one page brief argument on this issue is an attempt to distinguish a case, *Andrus v. Allard,* 100 S. Ct. 318, 444 U.S. 51, 61 L. Ed. 2d 210 (1979) which Appellant claims Judge Lee relied on in determining that the Act did not violate any property right. Confusingly, the trial court's order does not cite this case in any manner. Furthermore, Appellant attempts to use
Andrus to help his case by quoting a portion of the opinion which addresses *standing,* not the due process clause.

is entitled, reasonably and rationally determined that an occupation, involving the selling of urine to defraud drug tests or robbing banks, is unlawful.

Therefore, we find Appellant does not have a valid property right. Therefore, Judge Lee's order is affirmed on this issue.

III. Presumption of Guilt

Appellant argues the Act creates an impermissible presumption of guilt. For the reasons set forth in *Curtis* v. *State,* we sever the offending language from the rest of the Act.

IV. Remaining Issues

The remaining issues are affirmed pursuant to Rule 220, SCACR, and the following authority: *Curtis v. State,* 345 S.C. 557, 549 S.E.2d 591 (2001).

CONCLUSION

For the aforementioned reasons, the trial court's Order is **AFFIRMED** as modified.
MOORE, WALLER, BURNETT and PLEICONES, JJ., concur

APPENDIX C

THE SOUTH CAROLINA SUPREME COURT

Daniel E. Shearhouse
Clerk of Court
P.O. Box 11330
Columbia, South Carolina 29211

August 10, 2001

Robert C. Childs, III, Esquire Laura W.H. Teer, Esquire
Mitchell, Bouton, Yokel & Childs
POBox 10285, F .S.
Greenville, SC 29603

Re: Curtis, Kenneth E. v. State of SC, et al

Dear Counsel:

The Court has refused your Petition for Rehearing in the above case in the following

Order:

"Petition for Rehearing is denied.

s/ Jean H. Toal C.J.

s/ James E. Moore J.

s/ John H. Waller, Jr. J.

s/ E.C. Burnett, III J.

s/ Costa M. Pleicones J.

August 10, 2001."

The remittitur in this matter is today being forwarded to the Clerk of Court for Greenville County.

Very truly yours,

CLERK

DE S/dj p
cc: Assistant Attorney General Christie Newman Barrett

APPENDIX D

THE SOUTH CAROLINA SUPREME COURT

Daniel E. Shearhouse
Clerk of Court
P.O.Box 11330
Columbia, South Carolina

August 10, 2001

REMITTITUR

The Honorable Paul B. Wickensimer 305 E. North Street, Rm. 224 Greenville, SC 29601-2120

Re: Curtis, Kenneth E. v. State of SC, et al
99-CP -23- 2463

Dear Mr. Wickensimer:

The above referenced matter is hereby remitted to the trial court. A copy of the judgment of this Court is attached.

Very truly yours,

CLERK

Enclosure

cc: Robert C. Childs, III, Esquire
Laura W.H. Teer, Esquire
Assistant Attorney General Christie Newman Barrett

APPENDIX E

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

Alison Renee Lee, Circuit Court Judge

Case No. 99-CP-23-2463

Kenneth E. Curtis, Individually and d/b/a Privacy Protection Services, Appellant,

v.

The State of South Carolina, The South Carolina General Assembly Ex rel, Charles Molony Condon, as Attorney General for the State of South Carolina, Respondent.

PETITION FOR REHEARING AND
MEMORANDUM IN SUPPORT THEREOF

Robert C. Childs, III, #1218
Laura W. H. Teer, #16698
Beth M. Harbin, # 68249
MITCHELL, BOUTON, YOKEL&CHILDS
Attorneys for Appellant
Post Office Box 10285, F.S.
Greenville, S.C. 29603
(864) 232-9330

Pursuant to Rule 221 SCARC, the Respondent respectfully requests that this Court rehear the issues of whether S.C. Code Ann. § 16-13-470 is unconstitutionally vague and overbroad, whether it serves a legitimate public purpose, and whether it violates the Equal Protection Clause. The Petitioner believes that this court may have overlooked and failed to consider the following:

1. That this Court may have overlooked that the Act, as written, is unconstitutionally vague and overbroad and is almost impossible to comply with. The Act fails to define what it means by defrauding a drug or alcohol test.

The test for determining whether the statute is unconstitutionally vague was set forth in State v. Albert, 257 S.C. 131, 184 S.E.2d 605 (1971). "The concept of vagueness or indefiniteness rests on the constitutional principle that procedural due process requires fair notice and proper standards for adjudication. The primary issues involved are whether the provisions of a penal statute are sufficiently definite to give a reasonable notice of the prohibited conduct to those who wish to avoid its penalties and to apprise judge and jury of standards for the determination of guilt. If the statute is so obscure that men of common intelligence must necessarily guess at its meaning and differ as to its applicability, it is unconstitutional." The subject Act is not sufficiently definite to give reasonable notice of the prohibited conduct because it is so broad in its scope. Under the Act, as written, even consuming water before a drug screening test could be a violation.

The Act does not define whether it is applicable to screening only for illegal drugs and alcohol, substance abuse, or whether it applies to non-impairing prescription medications as well. Applied broadly, if one attempted to conceal their partaking of hypertensive drugs, one would be guilty of this offense. Of course, this statute is not limited to its application of drugs that impair. It apparently applies to tests for any type of drugs whether legal or not, subject to abuse or not. A person who sells, distributes, uses, or gives away any substance may be in violation of the Act, as any substance may "adulterate" urine or other bodily fluids. It is

certainly overbroad for this statute to apply to "a drug screening" of any type.

2. That this Court may have failed to consider in its public policy argument that while S.C. Code Ann. § 41-1-15 allows an employer to establish a drug prevention program which includes substance abuse testing, these test results shall not be released for or used or admissible in any criminal proceeding against the employee. S.C. Code Ann. § 41-1-15(D). In the present case, the statute is addressed solely at applying a criminal penalty to the arena of drug testing by private employers. Rather than making the information private or linking it to a drug prevention program, the Act is strictly penal in nature.

This statute does not address workplace safety, rather it is aimed only at halting the Appellant's business. There are no public consequences to testing positive to a drug test administered on the job. In fact, employers may only release information of a positive result to certain enumerated people. The Legislature has imposed a public consequence, however, for "defrauding a drug or alcohol screening test." This public consequence also extends to anyone using or selling any substance which may alter the results of a drug or alcohol screening test. If the Legislature truly had an interest in preventing drug use in the workplace, it would impose a criminal penalty for testing positive on a drug test administered by an employer.

3. That this Court may have overlooked the fact that although drug testing of employees through urinalysis was upheld by the United States Supreme Court in Skinner v. Railway Labor Executives' Association, 489 U.S. 602, 109 S.Ct. 1402, 103 L.Ed.2d 639 (1989), that case involved safety sensitive jobs and testing was performed only on reasonable suspicion or following an accident. The current case involves even random, suspicionless urinalysis of employees in jobs that aren't safety sensitive. The State is now intervening between private businesses and employees. This Act represents a dangerous expansion of the intrusions which have previously been allowed.

Previous statutes have addressed urinalysis first for employees in safety sensitive jobs and following an accident and eventually for all employees on a random basis. These

laws gave the employer the right to implement urinalysis procedures to monitor his own employees. No statute has gone so far as to say that private employers must test all employees to ensure workplace safety. Even if random urinalysis is rationally related to workplace safety, the subject Act is one step removed from this rational relationship. The State is now imposing a criminal penalty for the sale of urine or the sale or use of any other substance that could alter a drug or alcohol screening test. The Act imposes this criminal penalty even though there is no evidence that the sale or use of these substances actually defrauds drug screening tests or that prohibiting such activity actually promotes workplace safety. This line of thinking has dangerous implications. It suggests that the State can proscribe any conduct it wishes, simply by stating it has a connection to drug use, no matter how tenuous. The statutes will not need to be otherwise related to a legitimate public purpose as long as they can be related to drug use or testing for drug use.

4. That this Court may have failed to consider that the activities of the Appellant encourage more secure testing methods by employers. They also serve the public interest by encouraging better methods of testing not subject to manipulation. Current urinalysis practices only serve the interests of private testers and not the interests of the public. Drug testing is a for-profit industry and its motivation is strictly profit.

5. That this Court may have misinterpreted the Appellant's website and his intention. The website discusses the use of the urine kits for urinalysis purposes but does not tout them as means to evade drug tests. No where in the sited material is there a reference to drug tests. The Court has misinterpreted the Appellant's public opposition to widespread urinalysis by employers as an intent to defraud drug screening tests. Drug screening tests are only one type of urinalysis.

6. That this court erred in determining that the state legislature correctly determined that the selling of urine to defraud drug tests is an unlawful occupation. The state legislature is not the final arbiter when determining legal principals, especially when they infringe upon a citizen's constitutional rights. Our Nation and state was created on a

system of checks and balances, therefore Appellant requests the Court to reconsider the weight and credence they previously gave to the Legislature while enacting such a frivolous statute.

7. That this Court may have failed to consider that the statute no longer fulfills its legislative intent once the presumptive intent clause is severed. This statute was enacted solely to shut down the Appellant's business. Severing the presumptive intent clause renders the statute ineffective for its purpose and therefore, the entire statute should be struck down.

8. That this Court may have failed to consider that there is no evidence that urinalysis or drug testing creates or encourages a drug-free workplace. Furthermore, the existence of drug metabolites is no indication of whether a person is impaired by those substances. The Legislature cannot enact any law it wishes under the guise that it deters drug use, if that act is not shown to serve a legitimate public purpose.

This Court erred in finding that the statute ensures drug screening is effective when there was no evidence presented to support that contention. Drug screening does not measure impairment in job performance. Tests of manual dexterity and cognitive sharpness would be more rationally related to a proposed public purpose of workplace safety than simply testing for the presence of metabolites.

This Court is correct in stating that drug screening has been held lawful in certain limited situations. The constitutionality of drug screening does not, however, extend to this statute which does not serve to protect the general safety and welfare of the public. No evidence has been presented that the Appellant's business actually serves to defraud drug tests or that the use of his product affects workplace safety. In fact, the drug screening tests do not indicate impairment at all and are therefore not useful for establishing problems with job performance or safety.

8. That this Court may have overlooked the plainly arbitrary classification in its discussion of the Equal Protection violation. As stated in the previous arguments, there is no indication that the Appellant's product has any

impact on the public interest or that it is rationally related to a legitimate public purpose.

/s Robert C. Childs, III
Robert C. Childs, III, S.C. Bar # 1218
Laura W. H. Teer, S.C. Bar # 16698
Beth M. Harbin, S.C. Bar # 69249
MITCHELL, BOUTON, YOKEL&CHILDS
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rchilds@mbyclawfirm.com
Attorneys for Appellant

Date : October 24, 2000

APPENDIX F

S.C. CODE ANN. § 16-13-470

CODE OF LAWS OF SOUTH CAROLINA ANNOTATED
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TITLE 16. CRIMES AND OFFENSES
CHAPTER 13. FORGERY, LARCENY, EMBEZZLEMENT, FALSE PRETENSES AND CHEATS

§ 16-13-470. Defrauding drug and alcohol screening tests; penalty.

(A) It is unlawful for a person to:

(1) sell, give away, distribute, or market urine in this State or transport urine into this State with the intent of using the urine to defraud a drug or alcohol screening test;

(2) attempt to foil or defeat a drug or alcohol screening test by the substitution or spiking of a sample or the advertisement of a sample substitution or other spiking device or measure;

(3) adulterate a urine or other bodily fluid sample with the intent to defraud a drug or alcohol screening test;

(4) possess adulterants which are intended to be used to adulterate a urine or other bodily fluid sample for the purpose of defrauding a drug or alcohol screening test; or

(5) sell adulterants which are intended to be used to adulterate a urine or other bodily fluid sample for the purpose of defrauding a drug or alcohol screening test.

Intent is presumed if a heating element or any other device used to thwart a drug-screening test accompanies the sale, giving, distribution, or marketing of urine or if instructions which provide a method for thwarting a drug-screening test

accompany the sale, giving, distribution, or marketing of urine.

(B) A person who violates a provision of subsection (A):

(1) for a first offense, is guilty of a misdemeanor and, upon conviction, must be fined not more than five thousand dollars or imprisoned not more than three years, or both; and

(2) for a second offense or subsequent offense, is guilty of a felony and, upon conviction, must be fined not more than ten thousand dollars or imprisoned not more than five years, or both.

History: Added by 1999 Act No. 65 § 1, eff June 11, 1999

Presumptive intent clause struck by South Carolina Supreme Court by Order dated July 17, 2001 filed in Curtis v. State, 345 S.C. 557, 549 S.E.2d 591 (2001).

APPENDIX G

S.C. Code Ann. § 41-1-15
CODE OF LAWS OF SOUTH CAROLINA ANNOTATED
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TITLE 41. LABOR AND EMPLOYMENT
CHAPTER 1. GENERAL PROVISIONS

S.C. Code Ann. § **41-1-15** (1999)

§ 41-1-15. Establishment of drug prevention program in workplace; confidentiality of information concerning test results.

(A) Notwithstanding any other provision of the law, an employer may establish a drug prevention program in the workplace pursuant to Section 38-73-500(B) which shall include:

(1) a substance abuse policy statement that balances the employer's respect for individuals with the need to maintain a safe, productive, and drug-free environment. The intent of the policy shall be to help those who need it while sending a clear message that the illegal use of nonprescription controlled substances or the abuse of alcoholic beverages is incompatible with employment at the specified workplace; and

(2) notification to all employees of the drug prevention program and its policies at the time the program is established by the employer or at the time of hiring the employee, whichever is earlier.

(B) All information, interviews, reports, statements, memoranda, and test results, written or otherwise, received by the employer through a substance abuse testing program are confidential communications, but may be used or received in evidence, obtained in discovery, or disclosed in any civil or administrative proceeding.

(C) Employers, laboratories, medical review officers, insurers, drug or alcohol rehabilitation programs, and employer drug prevention programs, and their agents who receive or have access to information concerning test results shall keep all information confidential. Release of such information under any other circumstance shall be solely pursuant to a written consent form signed voluntarily by the employee tested or his designee unless the release is completed through disclosure by an agency of the State in a civil or administrative proceeding, order of a court of competent jurisdiction, or determination of a professional or occupational licensing board in a related disciplinary proceeding. The consent form must contain at a minimum:

(1) the name of the person who is authorized to obtain the information;

(2) the purpose of the disclosure;

(3) the precise information to be disclosed;

(4) the duration of the consent; and

(5) the signature of the person authorizing release of the information.

(D) Information on test results shall not be released for or used or admissible in any criminal proceeding against the employee.

HISTORY: Added by 1997 Act No. 92, § 2, eff June 10, 1997.

NOTES:

RESEARCH AND PRACTICE REFERENCES

62A Am Jur 2d, Privacy § 61.

28 Am Jur Proof of Facts 3d 185, Proof of Violation of Privacy Rights in Employment Drug Testing.

ANNOTATIONS

Liability for discharge of at-will employee for refusal to submit to drug testing. 79 ALR4th 105.

Employee's action in tort against party administering polygraph, drug, or similar test at request of actual or prospective employer. 89 ALR4th 527.

EDITOR'S NOTE--

The Preamble of 1997 Act No. 92 provides as follows:

"Whereas, the members of the General Assembly recognize the importance of all employers and employees in the State to maintain and operate in a drug-free workplace, and promote the participation of businesses in drug prevention programs. Through such participation, employers have the opportunity to maximize their levels of productivity, enhance their competitive positions in the marketplace, and reach their desired levels of success without experiencing the costs, delays, and tragedies associated with work related accidents resulting from substance abuse by employees; and

"Whereas, nationally, the cost of substance abuse in the workplace is estimated at a staggering one hundred billion annually, and this cost is paid by employers in many different ways; and

"Whereas, the intention of the act is to provide incentive for employers to prevent drug use and the tragedies associated with work related accidents and to deter the corresponding losses in the form of workers' compensation claims, personnel, and economic productivity; and

"Whereas, since workers' compensation insurers typically provide support services to employer-clients, the General Assembly believes that insurers will compete for the business of employers participating in drug prevention programs and will provide the appropriate premium credit for various classes of employment with a successful

program due to the administrative cost savings in many ways including those from a reduction in work related accidents by employees with substance abuse and litigation expenses;".

APPENDIX H

IN THE STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
COUNTY OF GREENVILLE	)	
Kenneth E. Curtis, Individually, and d/b/a Privacy Protection Services, Plaintiff,	)	C/A: 99-CP-23-2463 **COMPLAINT**
vs. The State of South Carolina Defendants.	)	(Jury Trial Requested)

Plaintiff hereby alleges:

FOR A FIRST CAUSE OF ACTION
(Constitutionality of Statute)

1. The Plaintiff Kenneth E. Curtis is a citizen and resident of the County of Greenville, State of South Carolina who owns and operates a business known as Privacy Protection Services whose principal place of business is the County of Greenville, State of South Carolina. Said business engages extensively in interstate commerce and does business with customers in most if not all States in the United States of America, including the State of South Carolina.

2. The Defendant State of South Carolina is one of the States in the United States of America and is the principal governing legislative authority in the geographical region of South Carolina.

3. The Plaintiff's business, known as Privacy Protection Services, has been in existence in the State of South Carolina for approximately three (3) years. The principal business of Privacy Protection Services, among other things, is

the sale of unadulterated and certified drug free human urine in interstate commerce. The Plaintiff has invested significant funds into said business and derives a substantial source of his income from said business.

4. At all times alleged herein the Plaintiff harbored a reasonable expectation of privacy and a protected property right in the use and conveyance of his own human urine. As such, the Plaintiff at all times alleged herein had and has the right to possess, use, sell or give away his urine if he wishes to do so. The Plaintiff furthermore uses the conveyance of his own urine as a manner of his expression and speech concerning the issue of urine testing in the United States of America.

5. The State of South Carolina, passed the attached and herein incorporated 1999 S. B. 277 (the "Act"), which was passed into law by signature of the Governor of the State of South Carolina on June 11, 1999. Said Act, among other things, prohibits the giving away, distribution or sale of human urine with the intent to defraud private drug testing procedures. The stated purpose of the Act was to "protect private businesses."

6. The Act fails to define essential terms such as "transport," "foil," "defeat," "spiking," "spiking device," "adulterate," "drug or alcohol screening," "heating element," and "thwart." The Act prohibits the "transport of urine with the intent of using the urine to defraud a drug or alcohol screening test." It is known to the Plaintiff that numerous herbs, health food products, concoctions, foods, vitamins, and over-the-counter substances are marketed and sold to the public, which may affect or that are advertised to affect human urine in a manner that may affect urine tests and that every living human being in South Carolina transports urine within their bodies. Furthermore, such products set forth above may be considered to adulterate urine or other bodily fluids.

7. The Act does not specifically limit its application to human urine or human bodily fluids and may be applied to urine tests that are unrelated to drug abuse or the unlawful consumption of controlled substances.

8. The Act presumes criminal intent and thusly impermissibly shifts the burden of proof from the State to a Defendant in violation of the requirements of Due Process.

9. Said Act is vague, overly broad, arbitrary and capricious, lending excessive discretion in enforcement officials and is without a legitimate and rational public purpose. The Act, furthermore, is inconsistent with the Constitution of the United States and contravenes a common right enjoyed by other providers of such similar type services and products. The Act fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the Statute and encourages arbitrary and erratic arrests and convictions. The Act assesses criminal liability without requiring criminal intent and makes criminal an innocent act.

10. The Act, furthermore, interferes with existing contracts established between the Plaintiff and private individuals and attempts to control the use of private property to the extent unnecessary for public welfare. The Act has also "chilled" the business of the Plaintiff and constitutes a wrongful and unconstitutional interference and deprivation of the Plaintiff's property rights to do business, his privacy rights, liberty to contract and freedom of speech in violation of the First, Fourth, Fifth, Sixth and Fourteenth Amendments of the Constitution of the United States and Article I, Sections 2, 3 and 13 of the Constitution of the State of South Carolina and the statutory and decisional laws of the State of South Carolina.

11. The Act violates the United States Constitution's Fourth Amendment safeguards of privacy of individuals against arbitrary and unwarranted government intrusions and invades the privacy interests of the Plaintiff and others and the governmental interest in subject matter is insufficient to warrant the enactment of the same and diminishes personal privacy for a "symbol's sake." The Act does not regulate even-handedly to effectuate a legitimate local purpose and significantly effects and excessively burdens interstate commerce in violation of Article I, §8 of the United States Constitution.

12. The Act takes a portion of the Plaintiff's protected property rights in the business generated by sale of human urine without compensation. The Act has also created an arbitrary classification without a rational basis which amounts to invidious discrimination, in violation of the equal protection clause of the United States Constitution Amendment XIV, Section 1 and unreasonably interferes with the personal and privacy rights of the Plaintiff.

13. The Act bears no reasonable relation to a legitimate public purpose. The Act offends notions of liberty that are implicit in the concept of ordered liberty.

14. The Act provides a punishment so grossly disproportionate to the offense committed so as to be cruel and unusual punishment in violation of the Eighth Amendment of the United States Constitution and Article I, §15 of the South Carolina Constitution.

15. Wherefore, Plaintiff is informed and believes that he is entitled to an order of this Court voiding said Act for the above grounds and for attorney's fees and costs of this action.

FOR A SECOND CAUSE OF ACTION
(Ex parte, Temporary and Permanent Restraint From Enforcement)

16. Each and every allegation of the preceding cause of action are incorporated herein by reference as fully as if repeated verbatim where not inconsistent herewith.

17. Said Act is causing immediate and irreparable injury, loss or damage, which are not easily ascertainable or calculable, and the Act furthermore subjects the Plaintiff to eminent threat of criminal arrest and prosecution.

18. Plaintiff is informed and believes that he is entitled to an ex parte temporary restraining order, temporary injunction, permanent injunction and writ of mandamus and staying the enforcement of this Act by the Defendants during the pendency of this action.

FOR THIRD CAUSE OF ACTION
(Inverse Condemnation)

19. Each and every allegation of the preceding causes of action are incorporated herein by reference as fully as if repeated verbatim where not inconsistent herewith.

20. The actions of the Defendant as set forth in the preceding causes of action are in violation of Article I, Section 3 and 13 of the Constitution of the State of South Carolina and the statutory and decisional laws of the State of South Carolina, along with the previously mentioned violations of the United States Constitutional, Statutory and Decisional laws.

21. The Plaintiff's property, liberty and privacy rights have been taken without compensation under the law by the enactment of the statute by the Defendant as set forth above.

22. As a direct and proximate result of the aforesaid, the Plaintiff has and will suffer substantial past, present, and future damage to the income of the business.

23. The Plaintiff is informed and believes that he is entitled to judgment against State for actual damages in an amount to be determined by a jury, plus attorney's fees and costs pursuant to South Carolina Code Annot. Section 15-77-300 (1976).

WHEREFORE, having fully plead, the Plaintiff prays:

1. that process issue;
2. for a jury trial on all issues so triable;
3. for judgment against the Defendant for actual damages in an amount to be determined by a jury;
4. for an ex parte temporary restraining order, temporary injunction, permanent injunction and writ of mandamus against the enforcement of the Act;
5. an invalidation of the Act in its entirety;
6. for attorney's fees and costs of this action; and
7. for such other and further relief as this Court deems just and proper.

MITCHELL, BOUTON, YOKEL & CHILDS

By: /s Robert C. Childs, III
Robert C. Childs, III #1218
P. O. Box 10285, F.S.
Greenville, SC 29673
(864) 232-9330
ATTORNEY FOR PLAINTIFF

Greenville, South Carolina
Dated: June 18, 1999

Introduced by Senators Thomas, Giese and Wilson

S. Printed 5/20/99-S

Read the first time January 12, 1999

A BILL

TO AMEND THE CODE OF LAWS OF SOUTH CAROLINA, 1976, BY ADDING SECTION 16-3-1080 SO AS TO PROVIDE THAT SELLING URINE WITH THE INTENT TO DEFRAUD A DRUG SCREENING TEST IS A FELONY, AND TO PROVIDE A PENALTY.

Amend Title To Conform

Be it enacted by the General Assembly of the State of South Carolina:

SECTION 1. The 1976 Code is amended by adding:

"Section 16-13-470. (A) It is unlawful for a person to:

(1) sell, give away, distribute, or market urine in this State or transport urine into this State with the intent of using urine to defraud a drug or alcohol screening test;

(2) attempt to foil or defeat a drug or alcohol screening test by the substitution or spiking of a sample or the advertisement of a sample substitution or other spiking device or measure;

(3) adulterate a urine or other bodily fluid sample with the intent to defraud a drug or alcohol screening test;

(4) possess adulterants which are intended to be used to adulterate a urine or other bodily fluid sample for the purpose of defrauding a drug or alcohol screening test; or

(5) sell adulterants which are intended to be used to adulterate a urine or other bodily fluid sample for the purpose of defrauding a drug or alcohol screening test.

Intent is presumed if a heating element or any other device used to thwart a drug-screening test accompanies the sale, giving distribution, or marketing of urine or if instructions which provide a method for thwarting a drug-screening test accompany the sale, giving, distribution, or marketing of urine.

(B) A person who violates a provision of subsection (A):

(1) for a first offense, is guilty of a misdemeanor and, upon conviction, must be fined not more than five thousand dollars or imprisonment not more than three years, or both; and

(2) for a second or subsequent offense, is guilty of a felony and, upon conviction, must be fined not more than ten thousand dollars or imprisoned not more than five years, or both."

SECTION 2. This act takes effect upon approval of the Governor

APPENDIX I

IN THE STATE OF SOUTH CAROLINA	IN THE COURT OF COMMON PLEAS
COUNTY OF GREENVILLE	
Kenneth E. Curtis, Individually, and d/b/a Privacy Protection Services, Plaintiff,	C/A: 99-CP-23-2463 **AMENDED COMPLAINT**
vs.	(Jury Trial Requested)
The State of South Carolina Ex rel. Charles Molony Condon, as Attorney General for the State of South Carolina in re Act No.: 65, Defendants	

Plaintiff, in conformity with the Order of the Honorable Henry F. Floyd, dated September 16, 1999, and without prejudice to the appeal presently pending and future appeals, if any, from the Order dated September 16, 1999 and without waiver of the allegations set forth in the Plaintiff's previous Complaint, hereby alleges:

FOR A FIRST CAUSE OF ACTION
(Constitutionality of Statute)

1. The Plaintiff Kenneth E. Curtis is a citizen and resident of the County of Greenville, State of South Carolina, who owns and operates a business known as Privacy Protection Services and whose principal place of business is the County of Greenville, State of South Carolina. Said business engages extensively in interstate commerce and does

business with customers in most, if not all, States in the United States of America, including the State of South Carolina.

2. The Defendant State of South Carolina is one of the States in the United States of America.

3. Hon. Charles Molony Condon, in his capacity as the Attorney General for the State of South Carolina, is the chief prosecuting officer of the State of South Carolina pursuant to S.C. Const. Art. V, §24 and supervises the prosecution of all criminal cases in courts of record including those brought in the County of Greenville in the State of South Carolina and supervises and is responsible for the activities of the South Carolina Attorney General's Office, one of which is to defend the validity of this Act. Hon. Charles Molony Condon is named for the purpose of staying the enforcement of the Act and defending the validity of this Act in conformity with the Court's Order.

5. The Plaintiff's business, known as Privacy Protection Services, has been in existence in the State of South Carolina for approximately three (3) years. The principal business of Privacy Protection Services, among other things, is the sale of human urine in interstate commerce. The Plaintiff, among other things, accompanies his sales with devices and instructions, which reflect the Plaintiff's beliefs concerning urine testing. The Plaintiff has invested significant funds into said business and derives a substantial source of his income from said business.

6. At all times alleged herein, the Plaintiff harbored a reasonable expectation of privacy and a mutually understood protected property right in the use and conveyance of his own human urine. As such, the Plaintiff at all times alleged herein had and has the right to possess, use, sell or give away his urine if he wishes to do so. The Plaintiff furthermore uses the conveyance of his own urine and accompanying devices and literature as a manner of his expression and speech concerning the issue of urine testing in the United States of America.

7. The Defendant, by and through the General Assembly, passed the attached and herein incorporated 1999 Act No. 65 (hereinafter referred to as the "Act"), which was passed into law by signature of the Governor of the State of South Carolina on June 11, 1999 and is a penal statute

subjecting the Plaintiff to arrest and prosecution at any time. Said Act, among other things, prohibits the giving away, distribution or sale of human urine with the intent to defraud private drug testing procedures. The stated purpose of the Act was to "protect private businesses."

8. The Act fails to define essential terms such as "transport," "foil," "defeat," "spiking," "spiking device," "adulterate," "drug or alcohol screening," "heating element," and "thwart." The Act prohibits the "transport of urine with the intent of using the urine to defraud a drug or alcohol screening test." It is known to the Plaintiff that numerous herbs, health food products, concoctions, foods, vitamins, over-the-counter substances and water are marketed and sold to the public, which may affect or that are advertised to affect human urine in a manner that may affect urine tests and that every living human being in South Carolina transports urine within their bodies. One of the primary adulterants of urine for testing purposes is common drinking water. Furthermore, such products set forth above may be considered to adulterate urine or other bodily fluids.

9. The Act does not specifically limit its application to human urine or human bodily fluids and may be applied to urine tests that are unrelated to drug abuse or the unlawful consumption of controlled substances. All drug tests are not intended to detect substances that might impair a human body.

10. The Act presumes criminal intent and thusly impermissibly shifts the burden of proof from the State to a Defendant in violation of the requirements of Due Process.

11. Said Act is vague, overly broad, arbitrary and capricious, lending excessive discretion in enforcement officials and is without a legitimate and rational public purpose. The Act, furthermore, is inconsistent with the Constitution of the United States and contravenes a common right enjoyed by other providers of such similar type services and products. The Act fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the Statute and encourages arbitrary and erratic arrests and convictions. The Act assesses criminal liability without requiring criminal intent and makes criminal an innocent act.

12. The Act, furthermore, interferes with existing contracts established between the Plaintiff and private individuals and attempts to control the use of private property to the extent unnecessary for public welfare. The Act has also "chilled" the business of the Plaintiff and constitutes a wrongful and unconstitutional interference and deprivation of the Plaintiff's property rights to do business, his privacy rights, liberty to contract and freedom of speech in violation of the First, Fourth, Fifth, Sixth and Fourteenth Amendments of the Constitution of the United States and Article I, Sections 2, 3 and 13 of the Constitution of the State of South Carolina and the statutory and decisional laws of the State of South Carolina.

13. The Act violates the United States Constitution's Fourth Amendment safeguards of privacy of individuals against arbitrary and unwarranted government intrusions and invades the privacy interests of the Plaintiff and others and the governmental interest in subject matter is insufficient to warrant the enactment of the same and diminishes personal privacy for a "symbol's sake." The Act does not regulate even-handedly to effectuate a legitimate local purpose and significantly effects and excessively burdens interstate commerce in violation of Article I, §8 of the United States Constitution.

14. The Act takes a portion of the Plaintiff's protected property rights in the business generated by sale of human urine and deprives him of his own urine, both without compensation. The Act has also created an arbitrary classification without a rational basis which amounts to invidious discrimination, in violation of the equal protection clause of the United States Constitution Amendment XIV, Section 1 and unreasonably interferes with the personal and privacy rights of the Plaintiff.

15. The Act bears no reasonable relation to a legitimate public purpose. The Act offends notions of liberty that are implicit in the concept of ordered liberty.

16. The Act provides a punishment so grossly disproportionate to the offense committed so as to be cruel and unusual punishment in violation of the Eighth Amendment of the United States Constitution and Article I, §15 of the South Carolina Constitution.

17. Wherefore, a justiciable controversy exists between the parties and the Plaintiff is informed and believes that he is entitled to an order of this Court voiding said Act for the above grounds and for attorney's fees and costs of this action.

18. Alternatively, pursuant to the Uniform Declaratory Judgment Act, the Plaintiff is informed and believes that he is entitled to an interpretation of the Act by the Court to determine the relative rights, liabilities and responsibilities of the Plaintiff under the Act and in what manner he may, if any, legally comply with this Act, if said Act is valid and binding law.

FOR A SECOND CAUSE OF ACTION
(Ex parte, Temporary and Permanent Restraint From Enforcement)

19. Each and every allegation of the preceding cause of action are incorporated herein by reference as fully as if repeated verbatim where not inconsistent herewith.

20. Said Act is causing immediate and irreparable injury, loss or damage, which are not easily ascertainable or calculable, and the Act furthermore subjects the Plaintiff to eminent threat of criminal arrest and prosecution by the Enforcement Defendants.

21. Plaintiff is informed and believes that he is entitled to an ex parte temporary restraining order, temporary injunction, permanent injunction and writ of mandamus prohibiting the Enforcement Defendants from initiating the Plaintiff's arrest and prosecution and staying the enforcement of this Act by the Defendants during the pendency of this action.

FOR THIRD CAUSE OF ACTION
(Inverse Condemnation)

22. Each and every allegation of the preceding causes of action are incorporated herein by reference as fully as if repeated verbatim where not inconsistent herewith.

23. The actions of the Defendant as set forth in the preceding causes of action are in violation of Article I, Section 3 and 13 of the Constitution of the State of South Carolina and the statutory and decisional laws of the State of South Carolina, along with the previously mentioned violations of the United States Constitutional, Statutory and Decisional laws.

24. The Plaintiff's property, liberty and privacy rights have been taken without compensation under the law by the enactment of the statute by the Defendant as set forth above.

25. As a direct and proximate result of the aforesaid, the Plaintiff has and will suffer substantial past, present, and future damage to the income of the business of his rights.

26. The Plaintiff is informed and believes that he is entitled to judgment against the Defendant for actual damages in an amount to be determined by a jury, plus attorney's fees and costs pursuant to South Carolina Code Annot. Section 15-77-300 (1976).

WHEREFORE, having fully plead, the Plaintiff prays:

1. that process issue;
3. for a jury trial on all issues so triable;
3. for judgment against the Defendant for actual damages in an amount to be determined by a jury;
4. for an ex parte temporary restraining order, temporary injunction, temporary writ, permanent injunction and writ of mandamus against the enforcement of the Act against the Plaintiff;
5. an invalidation of the Act in its entirety;
6. for attorney's fees and costs of this action; and
7. for such other and further relief as this Court deems just and proper.

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(2)

Supreme Court, U.S.
FILED
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No. 01-875

In The
Supreme Court of the United States

Kenneth Curtis, Individually and d/b/a
Privacy Protection Services,

Petitioners,

vs.

The State of South Carolina, The South Carolina General Assembly ex. rel., Charles M. Condon, as Attorney General for the State of South Carolina

Respondents.

On Petition For A Writ Of Certiorari
To The South Carolina Supreme Court

Respondents' Brief In Opposition

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QUESTIONS PRESENTED

I. WHETHER THE SOUTH CAROLINA SUPREME COURT, CONSISTENT WITH THIS COURT'S RELEVANT DECISIONS, PROPERLY DETERMINED THAT S.C. CODE ANN. § 16-13-470 DOES NOT VIOLATE ARTICLE I, § 8 OF THE UNITED STATES CONSTITUTION BY PROHIBITING THE TRANSPORTATION OF URINE INTO SOUTH CAROLINA WHEN SUCH URINE IS INTENDED TO DEFRAUD A DRUG TEST.

II. WHETHER THE SOUTH CAROLINA SUPREME COURT, CONSISTENT WITH THIS COURT'S RELEVANT DECISIONS, PROPERLY DETERMINED THAT S.C. CODE ANN. § 16-13-470 DOES NOT VIOLATE PETITIONERS' SUBSTANTIVE DUE PROCESS RIGHTS BY IMPACTING ON THE FIRST AMENDMENT RIGHTS OF FREEDOM OF EXPRESSION AND THAT, EVEN IF THIS STATUTE DID IMPINGE ON THOSE FIRST AMENDMENT RIGHTS, THE STATUTE COMPORTS WITH THE FOURTEENTH AMENDMENT.

III. WHETHER THE SOUTH CAROLINA SUPREME COURT, CONSISTENT WITH THIS COURT'S RELEVANT DECISIONS, PROPERLY DETERMINED THAT S.C. CODE ANN. § 16-13-470 DOES NOT VIOLATE PETITIONERS' CONSTITUTIONAL RIGHT OF PROCEDURAL DUE PROCESS UNDER THE FOURTEENTH AMENDMENT BECAUSE IT

IS NOT VAGUE AND OVERLY BROAD AND DOES NOT VIOLATE THE EQUAL PROTECTION CLAUSE BY DISPARATE TREATMENT.

IV. WHETHER THIS CASE PRESENTS ANY COMPELLING REASON TO GRANT A PETITION FOR WRIT OF CERTIORARI.

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COUNTER STATEMENT OF THE CASE

This case involves the constitutionality of a statute which prohibits the selling of urine with the intent to defraud a drug screening test, a statute passed pursuant to the police powers of the State of South Carolina. Petitioners have operated for three years under the business name of Privacy Protection Services with the principal place of business in Greenville, South Carolina. This business involves the sale of "unadulterated and certified drug free human urine in interstate commerce." Pet. App. 48a. Petitioners also include with the sale of the urine a pouch, tube and chemical hand warmer type device. *Curtis v. State*, 345 S.C. 557, 565, 549 S.E.2d 591, 595 (2001).

On June 11, 1999, the Governor of the State of South Carolina signed into law Senate Bill 277, which amends S.C. Code Ann. § 16-13-470 (hereinafter, the "Statute") "to provide that selling urine with the intent to defraud a drug screening test is a felony. . .." 1999 S.C. Acts 65. Section 16-13-470 provides a penalty for the first offense of a fine of not more than five thousand dollars and imprisonment of not more than three years or both and a penalty for the second or subsequent offense of a fine of not more than ten thousand dollars or imprisonment of not more than five years, or both. S.C. Code Ann. § 16-13-470 (West Supp. 2000). Before the South Carolina Supreme Court struck such language, the Statute provided that "[i]ntent is presumed if a heating element or any other device used to thwart a drug-screening test accompanies the sale . . .." *Id.*

In their Complaint, Petitioners allege that this Statute "constitutes a wrongful and unconstitutional interference and deprivation of the Petitioners's property rights to do business, his privacy rights, liberty to contract and freedom of speech in violation of the First, Fourth, Fifth, Sixth and Fourteenth Amendments of the Constitution of the United States and Article I, Sections 2, 3 and 13 of the Constitution of the State of South

Carolina and the statutory and decisional laws of the State of South Carolina." Pet. App. 50a. The Complaint sets forth three causes of action seeking an Order (1) declaring the statute unconstitutional; (2) enjoining the enforcement of the statute; and (3) granting a judgment for damages, based upon the theory of inverse condemnation, attorneys fees and costs. Pet. App. 47a - 52a.

On March 18, 1999, the Honorable Charles B. Simmons issued an Order Granting *Ex Parte* Temporary Restraining Order restraining the enforcement of 1999 S.C. Sen. Bill 277 pending a hearing on the Motion for temporary restraining order. A hearing was conducted on June 25, 1999, before the Honorable Tom J. Ervin, Circuit Court Judge, in the Greenville County Court of Common Pleas, on the Petitioners' Motion for Temporary Restraining Order and/or Temporary Injunction. Judge Ervin denied the Petitioners' Motion for temporary injunction and issued a formal order on July 8, 1999. Petitioners filed a Motion for Reconsideration which was denied. An appeal of the denial of the temporary injunction followed.

On September 1, 1999, the Honorable Henry Floyd conducted a hearing and ordered the proceedings bifurcated with regard to the damages issues and the constitutional issues. Pending the appeal of the denial of the temporary injunction, on May 2, 2000, the Honorable Alison R. Lee heard the merits of the case and ruled that the Statute was constitutional in an order filed August 18, 2000. Judge Lee denied a motion to reconsider on September 27, 2000, and an appeal followed.

Thus, these issues came before the South Carolina Supreme Court on separate appeals, first on the denial of a temporary injunction and then on the appeal of the hearing on the merits. At a hearing on October 4, 2000, the South Carolina Supreme Court, in response to a motion by the Respondents that the appeal of the denial of the temporary injunction was rendered

moot by the issuance of an order on the merits, consolidated the merits appeal with the temporary injunction appeal. *Curtis*, 345 S.C. at 569, 549 S.E.2d at 597.

The South Carolina Supreme Court found that the Statute unconstitutionally shifts the burden of proof to the criminal defendant by stating that "intent is presumed" under certain conditions, thereby violating this Court's holding in *Sandstrom v. Montana*, 442 U.S. 510 (1979), because it acts as a conclusive presumption. *Curtis*, 345 S.C. at 570, 549 S.E. 2d at 597-98. The South Carolina Supreme Court severed the unconstitutional presumption language from the remainder of Section 16-13-470.

The South Carolina Supreme Court rejected Petitioners' other constitutional attacks of the Statute and found (1) Section 16-13-470 is not unconstitutionally vague and overbroad; (2) "Section 16-13-470 is a legitimate exercise of the State's police powers in regulating public safety and welfare" and that this "public purpose of creating safety in the workplace outweighs any legitimate interest, if any, of [Petitioners] in doing business[;]" (3) Section 16-13-470 does not violate Petitioners' right to free speech, particularly in light of the fact that the presumed intent language with regard to the inclusion of literature with the urine kit sales was severed; (4) Petitioners' "equal protection claims fail because all individuals who engage in conduct prohibited by section 16-13-470 are treated alike, regardless of whether they adulterate urine samples with herbal supplements or chemicals[;]" (5) the Statute does not violate the Eighth Amendment prohibition against cruel and unusual punishment; (6) this case does not involve the Commerce Clause and "does not unduly burden interstate commerce because it does not ban the sale of urine and other bodily fluids[;]"(7) the Statute does not involve an act of surveillance by the State and does not violate the right to privacy particularly when Petitioners do not have standing to assert the privacy rights of those subject to urine testing; (8) Petitioners do not have standing to assert the constitutional rights

of his customers, and the Statute does not violate the Fourth Amendment because it "does not mandate drug testing but simply makes it a crime to sell urine or other adulterants with the intent to defraud a drug test." *Curtis*, 345 S.C. 557, 549 S.E.2d 591 (2001).

REASONS FOR DENYING THE WRIT

The decision of the South Carolina Supreme Court is correct and does not conflict with the decisions of this Court, any federal court of appeals, or any other state court of last resort. Moreover, this case does not present any issue of broad importance. Further review is therefore not warranted.

I.

THE SOUTH CAROLINA SUPREME COURT PROPERLY HELD THAT S.C. CODE ANN. § 16-13-470 DOES NOT VIOLATE ARTICLE I, § 8 OF THE UNITED STATES CONSTITUTION BY PROHIBITING THE TRANSPORTATION OF URINE INTO SOUTH CAROLINA WHEN SUCH URINE IS INTENDED TO DEFRAUD A DRUG TEST.

Petitioners argue that S.C. Code Ann. § 16-13-470 impermissibly interferes with interstate commerce in that it prohibits the flow of interstate goods and burdens interstate commerce. The Commerce Clause, U.S. Const. art 1, § 8, however, is not invoked by the Statute, and the South Carolina Supreme Court properly rejected Petitioners' arguments finding that "this case does not involve the commerce clause, [sic] it involves the legislature's exercise of its police powers to prohibit commerce that is intended to defraud South Carolina employers and create an unsafe work environment." *Curtis*, 345 S.C. 557, 575, 549 S.E. 2d 591, 600 (2001).

The United States Supreme Court has recognized that the Commerce Clause "limits the powers of the States to erect barriers against interstate trade." *Lewis v. BT Investment Managers, Inc.*, 447 U.S. 27, 35 (1980). Section 16-13-470, however, does not erect barriers against interstate trade with regard to the selling, transporting, or distributing urine; it simply prohibits such activities when those activities are intended to defraud a drug screening test. Thus, the South Carolina Supreme Court properly found that "section 16-13-470 does not unduly burden interstate commerce because it does not ban the sale of urine or other bodily fluids [but] simply makes it unlawful for someone to sell, give away, distribute, or market urine with the *intent* to use the urine to defraud a drug or alcohol screening test." *Curtis*, 345 S.C. 557, 575, 549 S.E. 2d 591, 600 (2001). Thus, this Statute does not invoke the protections of the Commerce Clause.

Moreover, even if the Commerce Clause were invoked, this Court has constantly repeated, "not all burdens upon commerce, but only undue or discriminatory ones, are forbidden." *Breard v. Alexandria*, 341 U.S. 622, 636 (1951), citing *Nippert v. Richmond*, 327 U.S. 416, 425-26 (1946) ("Where no discrimination existed, in a somewhat similar situation, we upheld the state regulation as a permissible burden on commerce"). Section 16-13-470 does not discriminate against non-residents of South Carolina but prohibits anyone from selling, transporting, or distributing urine with the purpose of defrauding a drug test. Thus, any burden which may fall upon interstate commerce is not discriminatory and, therefore, does not violate the Commerce Clause.

Further, this Court has determined that "[t]his limitation upon state power, of course, is by no means absolute" and "the States retain authority under their general police powers to regulate matters of 'legitimate local concern,' even though interstate commerce may be affected.'" As outlined more fully

below, the exercise of South Carolina's police powers in securing public safety and safety in the workplace by prohibiting an activity which purports to defraud drug screening is not limited by the powers of the Commerce Clause.

II.

THE SOUTH CAROLINA SUPREME COURT PROPERLY DETERMINED THAT S.C. CODE ANN. § 16-13-470 DOES NOT VIOLATE PETITIONERS' SUBSTANTIVE DUE PROCESS RIGHTS BY IMPACTING ON THE FIRST AMENDMENT RIGHTS OF FREEDOM OF EXPRESSION. FURTHER, THE SOUTH CAROLINA SUPREME COURT PROPERLY HELD THAT, EVEN IF THIS STATUTE DID IMPINGE ON THOSE FIRST AMENDMENT RIGHTS, THE STATUTE COMPORTS WITH THE FOURTEENTH AMENDMENT.

Petitioners use a lot of space within their Petition to argue a political position with regard to the use of drug-screening tests and include similar arguments in literature packaged with the sale of the urine kits. Petitioners argue that the substantive right to free expression of ideas has been unconstitutionally prohibited in violation of the First Amendment by Section 16-13-470. This argument is without merit because (1) the Statute does not violate the substantive right to freedom of expression, and (2) even if this Court were to find that the Statute affects the First Amendment right to freedom of expression, this expression involves commercial speech, and the State of South Carolina has demonstrated a "reasonable fit" between the Legislature's ends and the means chosen to accomplish those ends. If this Court finds a stricter analysis is required, the State of South Carolina has certainly shown a compelling state interest and demonstrated that the statute is the least restrictive means of insuring its stated interest.

With regard to substantive due process rights, this case is reminiscent of the drug paraphernalia cases which have been subjected to numerous constitutional challenges. As stated by the South Carolina Supreme Court in its decision "the United States Supreme Court has held drug testing of employees through urinalysis is lawful and constitutional." *See, e.g., Skinner v. Railway Labor Executives' Association*, 489 U.S. 602 (1989) (testing railroad employees in a safety-sensitive position for drugs and alcohol after a serious accident was constitutional); *National Treasury Employees Union v. Von Raab*, 489 U.S. 656 (1989) (drug testing employees carrying firearms involved in the interdiction of illegal drugs involved a compelling government interest in self-protection and public safety); *Vernonia School Dist. 47J v. Acton*, 515 U.S. 646 (1995) (random drug testing of students involved in school athletic programs does not violate a student athlete's "expectation of privacy"). *See also Loder v. City of Glendale*, 14 Cal.4th 846, 927 P.2d 1200 (1997) (city's suspicionless drug testing of all job applicants who were offered positions was reasonable under Fourth Amendment).

Thus, drug testing utilizing urinalysis is lawful, constitutional, and in no way unreasonably violates an employee's privacy interest if the tests are conducted pursuant to the parameters discussed by the courts.

In the Petition, Petitioners argue that the Statute protects no legitimate public purpose, and Petitioners use the opportunity once again to further the political position in opposition to drug testing in the workplace. Many states, including South Carolina, have passed laws which permit random drug testing as one component to further the goals of achieving drug-free workplaces. *See* S.C. Code Ann. § 38-73-500 (West Supp. 2000) (workers' compensation credit for random drug testing "to provide incentive for employers to prevent drug use and the tragedies associated with work related accidents" Preamble of 1997 S.C. Act 92); as well as S.C. Code Ann. § 41-1-15 (West Supp. 2000) (authorizing

establishment of drug prevention program in workplace in order to give private sector employers the opportunity "to maximize their levels of productivity, enhance their competitive positions in the marketplace, and reach their desired levels of success without experiencing the costs, delays and tragedies associated with work related accidents resulting from substance abuse by employees" Preamble of 1997 S.C. Act 92).

By making illegal the sale of bodily fluids or other acts with the intent to defraud a drug screening test, the Legislature has added another important element to South Carolina's workplace drug prevention legislation. *Stein v. Davidson Hotel Co.*, 945 S.W.2d 714 (Tenn. 1997) (in light of state legislation promoting drug-free workplaces, no public policy is violated by a private employer discharging an at-will employee who tests positive for drug use on a random drug test). Not only has the Legislature tried to secure the safety of the workplace against those who use drugs, but also against those who provide the means to conceal the use of drugs.

As found by the South Carolina Supreme Court in its opinion in this case, "[a] statute making it unlawful to defraud a drug test furthers the public purpose of ensuring a drug-free workplace." *Curtis*, 345 S.C. at 573, 549 S.E.2d at 599. Thus, the South Carolina Supreme Court determined that "Section 16-13-470 is a legitimate exercise of the State's police powers in regulating public safety and welfare[,]" and that "public purpose of creating safety in the workplace outweighs any legitimate interest, if any, of [Petitioner] in doing business." *Id.*

Any substantive due process challenge against this Statute fails because South Carolina has passed this Statute pursuant to its police powers and shown a compelling governmental need to restrict this conduct of selling urine to defeat a drug-screening test.

Specifically, Petitioners' First Amendment challenge fails because the Statute does not prohibit Petitioners from expressing their beliefs about drug-screening tests. As originally enacted, section 16-13-470 provided as follows:

> Intent is presumed if a heating element or any other device used to a thwart a drug-screening test accompanies the sale, giving, distribution, or marketing of urine or *if instructions which provide a method for thwarting a drug-screening test accompany the sale, giving, distribution, or marketing of urine.*

S.C. Code Ann. § 16-13-470(A) (West Supp. 2000) (emphasis added). The South Carolina Supreme Court, however, in its opinion in this case severed this "intent" section as unconstitutionally shifting the burden of proof to the criminal defendant pursuant to the previous opinion of this Court in *Sandstrom v. Montana*, 442 U.S. 510 (1979). *Curtis*, 345 S.C. at 570, 549 S.E.2d at 597. Thus, the language regarding the inclusion of literature with the urine kits has been removed from the Statute.

The South Carolina Supreme Court rejected Petitioners' arguments and found that "Section 16-13-470 does not prohibit [Petitioner] from dispensing literature regarding his political beliefs on urine testing." *Id.* Moreover, the South Carolina Supreme Court had severed the portion of the Statute which provided that intent to defraud the drug testing will be presumed if "instructions which provide a method for thwarting a drug-screening test" accompanies the sale of his urine. *Id.* Thus, the portion of the Statute which mentioned the distribution of his literature has been severed so that Petitioner's facial attack on the Statute is without merit.

Additionally, Petitioners are in the commercial endeavor of selling urine to defraud drug testing, and such commercial speech enjoys much less protection under the Constitution. In *Ohralik v. Ohio State Bar Ass'n*, this Court held that "we instead have afforded commercial speech a limited measure of protection, commensurate with its subordinate position in the scale of First Amendment values, while allowing modes of regulation that might be impermissible in the realm of noncommercial expression." 436 U.S. 447, 456 (1978). Further, the State of South Carolina in this case has met the burden of proof with commercial speech established in *Board of Trustees of State University of New York v. Fox*, 492 U.S. 469 (1989), in that the State has demonstrated a "reasonable fit" between the Legislature's end in insuring public safety and safety in the workplace and the means chosen to accomplish those ends, *i.e.*, prohibiting the defrauding of these legitimate drug-screening tests by prohibiting the sale, transport, or distribution of urine or other adulterants intended to defraud these drug tests.

Moreover, this Court has held that "it has never been deemed an abridgment of freedom of speech or press to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language, either spoken, or written, or printed." *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490, 502 (1949). Thus, "the State does not lose its power to regulate commercial activity deemed harmful to the public whenever speech is a component of that activity." *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 456 (1978).

Section 16-13-470 does not even address, after severance of certain language by the South Carolina Supreme Court, the distribution of literature or the expression of ideas. This Statute proscribes certain "conduct" with the intent to defraud a drug test so that the Statute is not directed at Petitioners' expression of ideas regarding the validity or constitutionality of drug tests. *See*

S.C. Code Ann. § 16-13-470 (West Supp. 2000). Thus, Petitioner is free to express his ideas regarding drug-screening tests.

III.

THE SOUTH CAROLINA SUPREME COURT PROPERLY DETERMINED THAT S.C. CODE ANN. § 16-13-470 DOES NOT VIOLATE PETITIONERS' CONSTITUTIONAL RIGHT OF PROCEDURAL DUE PROCESS UNDER THE FOURTEENTH AMENDMENT BECAUSE IT IS NOT VAGUE AND OVERLY BROAD AND DOES NOT VIOLATE THE EQUAL PROTECTION CLAUSE BY DISPARATE TREATMENT.

The Due Process Clause protects against "the exaction of obedience to a rule or standard which [is] so vague and indefinite as really to be no rule or standard at all." *A.B. Small Co. v. American Sugar Refining Co.*, 267 U.S. 233 (1925). Further, a law is unconstitutionally vague if it forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess as to its meaning and differ as to its application. *Connally v. General Construction Co.*, 269 U.S. 385 (1926).

Generally, a criminal statute will be held invalid for vagueness when an individual could be held "criminally responsible for conduct which he could not reasonably understand to be proscribed." *United States v. Harris*, 347 U.S. 612, 617 (1954).

The Due Process Clause requires only that the statute sufficiently warn potential actors so that they may conduct themselves so as to avoid violating the law. *Rose v. Locke*, 423 U.S. 48, 50 (1975). *See also American Communications Ass'n v. Douds*, 339 U.S. 382 (1950) (constitutional standard for vagueness is the practical criterion of fair notice to those to whom the law applies). Moreover, this Court has held that one to whose

conduct the statute clearly applies does not have standing to challenge it for vagueness. *Parker v. Levy*, 417 U.S. 733 (1974).

Citing these well-settled principles of due process analysis, the South Carolina Supreme Court properly rejected Petitioners' arguments that Section 16-13-470 is unconstitutionally vague and overly broad. The South Carolina Supreme Court found that "[a]lthough some of the terms in section 16-13-470 are undefined, the intent of the statute is clear on its face." *Curtis*, 345 S.C. at 572, 549 S.E.2d at 598. The Statute specifically makes it unlawful to "sell, give away, distribute, or market urine... with the intent of using the urine to defraud a drug or alcohol screening test." In reviewing this statutory language, the South Carolina Supreme Court specifically found that "[a] person of ordinary intelligence seeking to obey the law will know, and is sufficiently warned of, the conduct the statute makes criminal." *Id.* Thus, the Act adequately warns Petitioner Curtis how to conduct himself and his business in order to avoid violating the law.

The South Carolina Supreme Court also properly rejected Petitioners' argument that terms such as "foil," "spike," "defraud," "bodily fluids," and "adulterate" are not defined by concluding that "all of these terms have common, ordinary meanings sufficient to proscribe conduct and do not need to be specifically defined." *Curtis*, 345 S.C. at 572, 549 S.E.2d at 598-99. The South Carolina Supreme Court further properly concluded that "all the Constitution requires is that the language convey sufficiently definite warnings as to the proscribed conduct when measured by common understanding and practices." *Id.* *See also United States v. Perilla*, 332 U.S. 1 (1947) ("The Constitution does not require impossible standards; all that is required is that the language conveys sufficiently definite warnings as to the proscribed conduct when measured by common understanding and practices."). These conclusions are consistent with relevant opinions of this Court.

Therefore, the Petition for Writ of Certiorari should be denied upon the grounds of procedural due process because the South Carolina Supreme Court properly concluded that the Statute is not unconstitutional as vague, overly broad, and ambiguous and, further, that this Statute adequately and fully warns Petitioners of what kind of activity is proscribed.

In this proceeding in support of its position that the Statute is vague and overly broad, Petitioners also argue that the Statute is subject to selective enforcement because it is so vague and overly broad in that it allows officials to treat people differently. Petitioners did not raise this specific issue with regard to selective enforcement before the South Carolina Supreme Court. If these arguments are instead Petitioners' arguments that the Statute violated the Equal Protection Clause because it "differentiates urine sales from the sale of herbal supplements and other products sold to mask drugs in one's urine," then the South Carolina Supreme Court properly analyzed and rejected those arguments. *Curtis*, 345 S.C. at 574, 549 S.E.2d at 599.

This Court has held that the Equal Protection Clause "is essentially a direction that all persons similarly situated should be treated alike." *Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 439 (1985). This Clause, however, creates no substantive rights but instead "embodies a general rule that State must treat like cases alike but may treat unlike cases accordingly." *Vacco v. Quill*, 521 U.S. 793, 799 (1997). *See also Plyler v. Doe*, 457 U.S. 202, 216 (1982) ("'[T]he Constitution does not require things which are different in fact or opinion to be treated in law as though they were the same.'").

The Statute clearly prohibits the sale of any adulterant which is intended to be used for the purpose of defrauding a drug test. *See* S.C. Code Ann. § 16-13-470 (West Supp. 2000). Further, any person who possesses, sells, transports, etc., urine or

adulterants with the purpose of defrauding a drug test is subject to this Statute. Thus, all such persons similarly situated are treated alike.

As properly found by the South Carolina Supreme Court, "this case does not involve a suspect classification or a fundamental right, so the question under equal protection analysis is whether the legislation is rationally related to a legitimate state purpose." *Curtis*, 345 S.E. at 574, 549 S.E.2d at 600 (citing from *Massachusetts Bd. Of Ret. v. Murgia*, 427 U.S. 307 (1976). The South Carolina Supreme Court properly rejected Petitioners' equal protection argument as follows:

> We find the classification of an individual who sells urine or an adulterant to defeat a drug test is rationally related to the legitimate state purpose of promoting a safe work environment. First, the classification is reasonably related to the legislative purpose of insuring the safety of the workplace through the protection of drug testing programs. Second, all people who constitute the class are treated similarly. The classification rests on a reasonable basis and includes any person who sells a product intended to adulterate urine or other bodily fluid sample for the purposes of defrauding a drug or alcohol screening test.

Curtis, 345 S.C. at 574, 549 S.E.2d at 600. Thus, the South Carolina Supreme Court properly found that Petitioners' equal protection claims fail because "all individuals who engage in conduct prohibited by section 16-13-470 are treated alike, regardless of whether they adulterate urine samples with herbal supplements or chemicals." *Id.*

Petitioners fail to establish an equal protection violation because (1) the Statute is reasonably related to the legislative

purpose of insuring the safety of the workplace and the general public through the protection of a drug testing program; (2) all those who constitute the class by desiring to defeat such drug testing through adulteration of the drug testing process are treated similarly, and (3) the Legislature's desire to protect the safety of the workplace and the general public welfare is reasonable. The fact that the classification of those who use urine to defeat drug tests may not "completely accomplish the legislative purpose" does not establish an equal protection violation.

Therefore, the Petition should be denied because the South Carolina Supreme Court's analysis and decision with regard to Petitioners' claims of violations of procedural due process claims, including equal protection claims, are consistent with this Court's prior relevant decisions and does not differ with those of another state or a federal court of appeals.

IV.

THIS CASE DOES NOT PRESENT ANY COMPELLING REASON TO GRANT A PETITION FOR WRIT OF CERTIORARI.

As provided, a "[r]eview on a writ of certiorari is not a matter of right, but one of judicial discretion" and "[a] petition for a writ of certiorari will be granted only for compelling reasons." Rule 10. This Petition presents no reasons favoring review of the decision of the South Carolina Supreme Court. Specifically, the South Carolina Supreme Court, this State's court of last resort, has not decided an important federal question in a way that conflicts with the relevant decisions of a United States Court of Appeals or another state court of last resort. Rule 10(b). Additionally, the South Carolina Supreme Court has not decided "an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of

this Court." Rule 10(c). Thus, review by this Court is not warranted.

For these reasons, as more specifically outlined above, the Petition for Writ of Certiorari should be denied.

CONCLUSION

Based upon the foregoing, Respondents respectfully submit that the Petition for Writ of Certiorari in this case is without merit and should be denied.

Respectfully submitted,

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